# REPORTS

## OF CASES ADJUDGED

IN THE

## DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

HENRY D. GILPIN.

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TO THE HONORABLE

# JOSEPH HOPKINSON,

## DISTRICT JUDGE OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

THIS volume of reports, deriving its chief value from his genius and learning, is respectfully inscribed, as some acknowledgment of his uniform kindness and courtesy, throughout a constant official intercourse of several years.

# TABLE

## OF CASES REPORTED.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

NOVEMBER SESSIONS, 1828.

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JOHN PHILLIPS, A. CHARDON, ROBERT GARDNER, WILLIAM EGAN, JAMES S. COLLINS, MICHAEL AND J. BROWN, AND WILLIAM KER,

*v.*

THE SHIP THOMAS SCATTERGOOD.

1. The master's wages are a personal charge on the owner, and give no claim on the vessel.
2. A contract for wages on a voyage is fulfilled and terminated on the discharge of the cargo at the last port of delivery.
3. Payment and receipt, on the final discharge of the cargo, is the usual and sufficient evidence of the termination of a seaman's contract for wages.
4. A seaman, whose wages have been paid up to the termination of a voyage, but who afterwards remains on board of the vessel, moored at the wharf, has no claim for services which a court of admiralty will enforce.
5. Workmen and materialmen, having a lien on a vessel, under the provisions of a state law, may enforce it by a suit *in rem* in the admiralty.
6. Workmen and materialmen, having a lien on a vessel which has been taken in execution and sold under a judgment in favour of the United States, are entitled to payment out of the fund in preference to the United States.

ON the 13th May, 1828, suit was brought by the United States of America against Henry Toland and John C. Smith, on a custom house bond for the payment of duties. On the 19th May, judgment was rendered for the United States, and on the 30th May, a writ of fieri facias issued. On the 15th

November following, the marshal made return, "that in pursuance of the said writ he had levied upon and taken in execution a ship called The Thomas Scattergood, and, after due and timely notice, sold the same for the sum of four thousand eight hundred dollars, which sum he had then in Court."

On the same day, John Phillips, lately master of the said vessel; A. Chardon, Robert Gardner, and William Egan, who alleged that they had done work on board; James S. Collins, lately chief mate; Michael and J. Brown, who had done riggers' work; and William Ker, who had supplied varnish for the vessel, severally filed their petitions and accounts, praying that the sums of money due to them respectively, might be paid out of the funds brought into court by the marshal, as the proceeds of the sale of the said vessel, under the execution just returned by him.

On the 28th November, the case was argued by H. Hubbell for the petitioners, and Ingersoll, District Attorney, for the United States.

On the 5th December, Judge Hopkinson delivered the following opinion:

The ship Thomas Scattergood, on her return to the port of Philadelphia, from a voyage to Canton, was taken in execution under a writ of fieri facias for a debt due to the United States. The ship arrived at Philadelphia on or about the 23d April, 1828, was seized by the marshal on the 30th May, and in due course of law, sold. The proceeds of the sale are now in the hands of the marshal, subject to the order of the Court. The petitioners, above named, have respectively filed their claims, and ask for payment from this fund in preference to the United States; and their right to this payment is now to be decided.

The first is an account presented by Captain J. Phillips for his wages, as master of the ship, amounting to five hundred and seven dollars. No evidence has been offered in proof of this account; but as it is entirely clear that the master's wages

are a personal charge on the owner, and give no claim upon the ship, it may be dismissed without further remark.

The petitioners, A. Chardon, Robert Gardner, and William Egan, have put into the possession of the Court nothing by which the nature of their several claims can be ascertained; they exhibit only orders from Captain Phillips on the owners of the ship, for their respective debts "for work on board the ship;" but as to what the work was, and when or where it was done, no information is given, either by the petition, the account filed, the order, or any other evidence or document. No opinion can, therefore, be given by the Court upon these claims; except that, in their present defective state, they must be dismissed.

The claim which has been most strenuously urged, as new and undecided, and in relation to which the most difficulty exists, is that of James S. Collins. It consists of a demand of wages from the 24th April, 1823, to the 14th June, of the same year, amounting to fifty-nine dollars and thirty-three cents, and a further charge of thirty dollars for boarding during the same period. In the petition filed, Collins alleges that he was first officer of the ship Thomas Scattergood, on her late voyage from Philadelphia to Canton in China, and back again; that he has only received his wages, as such first officer, to the 23d April, 1828; and that there is still due to him, he never having been discharged from the said situation until the 14th June following, the sum of fifty-nine dollars and thirty-three cents, as wages, and thirty dollars laid out for his own maintenance. In the affidavit of John Collins, annexed to the petition, it is stated, that the petitioner remained in charge of the ship after the discharge of her cargo; that is, from the 24th April, 1828, until the 14th June following: and that he had the entire care of the ship during that period, and maintained himself. It appears by the same affidavit that there was a watchman on board the ship, but who placed him there, or by whom he was paid, does not appear. The petitioner does not allege that he either employed or placed this watchman, and makes no charge

for his services. It seems, therefore, not to be absolutely certain that the vessel was in the care or charge of the petitioner; at least not entirely so, another person being there as a watchman (and one would seem to be sufficient) under some authority, and paid by somebody. How are we assured that the care of the vessel, whatever it was, assumed by the petitioner, was not a mere voluntary service, unrequired by any body interested in her? Neither his petition, nor any of his proofs, alleges that he was retained by the owners, or by any body, to take care of the ship; but merely that he had not been discharged from his situation of first officer. James Morrel, the second witness of the petitioner, says that he was paid his wages, upon the return of the ship to port, until her discharge on the 23d April; but whether he was afterwards retained or discharged by the owners, the witness does not know.

We see that the importance of proving how, and by whom, the petitioner was engaged in this service, was not overlooked, but the attempt failed. If it were necessary to scrutinise this claim closely, we could not fail to remark, that, for a portion of the time for which the petitioner claims to have had the entire care of the ship, she was actually in the custody of the marshal under his execution.

The case of the petitioner appears to be this. He was the first officer of the ship Thomas Scattergood on a voyage from Philadelphia to Canton, and back again. The ship returned to the port of Philadelphia, her cargo was discharged, and the petitioner was fully paid his wages to the time of her discharge. He afterwards remained in the ship, then lying at the wharf in Philadelphia, for the purpose, as he alleges, of taking care of her, and he now claims wages for this service as a continuation of his duties as the first officer of the ship. If it was part of his duty under that contract, and in performance of it, there would be no difficulty in saying that he has the same remedies for the recovery of wages for this service, as for that performed in the course of the voyage; and consequently that the body of the ship, or the proceeds of her sale, would be answerable

for the debt. But it seems to be very clear that this is not the case. What was the original contract? For labour and service on a voyage from Philadelphia to Canton and back to Philadelphia. On the return of the ship to Philadelphia, the voyage was completed, and the contract was certainly fulfilled and terminated on the discharge of the cargo. The owners of the ship, the other party to the contract, had no further claim on the petitioner for any duty or service under the contract; and, of course, he had no further claim upon them or their ship. The rights of the parties, in this respect, must be mutual and reciprocal; it cannot be, that the contract was ended and extinct as to one of the parties, and continued in full force and life as to the other. By our act of Congress, every seaman has a right to sue for his wages as soon as the voyage is ended and the cargo discharged at the last port of delivery: and this right could be given only on the ground that when the voyage is ended, and the cargo discharged, the contract is fulfilled. In this case the voyage was ended: the petitioner received his wages to the time of the discharge of the cargo, and his relation with the ship as a seaman on board of her, under his original contract, ceased. No formal act of discharge was required; the payment and receipt of the wages, is the usual and sufficient evidence of the termination of this relation. If the petitioner afterwards remained in the ship to watch her, or for any other purpose, it was a new service, and under a new contract, express or implied, or a mere volunteer act without any contract. No express contract is either proved or alleged; and the petitioner has his strongest case conceded, when it is agreed that the service raises a good consideration for a debt, and a contract may be implied or presumed from it.

This brings the case to the question, whether this is such a contract as may be enforced in the admiralty, and gives the claimant a lien on the ship for payment. It is a contract neither made at sea, nor for a service to be performed at sea, both were in the port of Philadelphia, within the body of the county of Philadelphia. The ship was safely moored at the

wharf, she had returned to the possession of the owners, the service had no agency in bringing her in, she had ceased to earn freight. The contract between the owners and the seamen had expired; the relation and rights created by that contract were dissolved. It is true that the same parties might make a new contract, but they could not extend the old one beyond its legal limits, nor give to the new one a character and privileges which the law denies to it. The place and subject matter of a contract decide its maritime character, and not the will of the parties. Is there an instance, in which a contract, made on land, for a service to be rendered on land, having no connection with any voyage performed or to be performed, has been deemed, by the general admiralty law, a case of admiralty jurisdiction, giving a lien on the ship? The meritorious service of the petitioner, if such it was, and the hardship of the case, have been strongly pressed in his behalf; but they must not be permitted to unsettle established principles, or to remove the land-marks of judicial jurisdiction. He should have been more careful to know by whom he was to be compensated before he gave his labour. Even now his remedy remains against his employer, perhaps against those to whom the service was rendered. Our inquiry is, whether the ship is answerable for it. The case of Ross v. Walker, (2 Wilson 264,) is directly in point. A pilot was sent for to Gravesend to come on board the ship Oxford, being in sea reach, who accordingly went on board of her there, and piloted her from thence to her moorings at Deptford. For his wages due him on that account he instituted a suit in the court of admiralty. A prohibition was moved for, on the suggestion that both the contract and the work done were within the body of the county. The court say, "We are much inclined to favour the pilot, (who is a most necessary mariner) if we could do it without breaking through the rules of law, because it would be for the benefit of trade, and save great expense to these poor men; but there is no instance to be found where the contract was at land, and to do work on board

within the body of some county, that the common law courts have ever permitted the admiralty to have jurisdiction."

That the petitioner had formerly been the mate of this ship, on a voyage that was ended, can make no difference in the case, which stands precisely as it would have done, if a third person had been engaged in this service, or if he had for the first time come on board the vessel. In the case of North and Vesey v. The Brig Eagle, (Bee Adm. Rep. 78) it is declared that "when contracts are made between the owner of a vessel, with the carpenters and others, to perform a service on land, or within the body of a county, the admiralty has no jurisdiction." So in the case of Pritchard v. Schooner Lady Horatia, in the same book (Bee Adm. Rep. 167.) The counsel for the petitioner has relied on a supposed analogy of his claim to that of a wharfinger, and on the principles of the case of Woolf and others v. The Brig Oder, (2 Peters Adm. Decisions 261.) As to wharfage, it is said by the court, in the case of Gardner and others v. The Ship New Jersey (1 Peters Adm. Decisions 228,) that "wharfage has been allowed out of proceeds, as the wharfinger might detain the ship until payment." This reason does not apply to the petitioner. In the case of Woolf and others v. The Brig Oder, the voyage was broken up, without any fault of the seamen, by a seizure for the debt of the owner, and, so far, by his default; and the seamen, by the exercise of a reasonable and just discretion in the court, were allowed their wages to the time of seizure, with an additional month's pay for their disappointment as well as to enable them to return to their homes, or obtain other employment. There is nothing in the circumstances or principles of this case, to assimilate it to that before the Court.

The claim of James S. Collins is therefore dismissed, not without the reluctance which attends the refusal of a demand probably meritorious and just, but which seeks satisfaction in the wrong place.

The claim of Michael and J. Brown, for riggers' work done to the ship, and of William Ker, for varnish used on her, stand

on different ground from those already disposed of, and require a separate consideration. Judge Winchester, after a learned argument in the case of Stevens v. The Sandwich, (1 Peters Adm. Decisions 233,) comes to the conclusion that "a ship carpenter, by the maritime law has a lien on the ship, for repairs in port." Judge Peters, in the case of Gardner v. The New Jersey, says that as the laws of Pennsylvania provide for shipwrights and materialmen, he has "generally referred the parties, exhibiting such claims, to the state jurisdiction, wishing to avoid all collisions and conflicts in such cases." Judge Bee, in the case of North v. The Brig Eagle already quoted, seems to limit the admiralty jurisdiction to supplies, &c. furnished to a foreign vessel in a neutral port. In that of Pritchard v. The Lady Horatia, which was a suit instituted against the vessel for work done, and materials found by shipwrights, the vessel being foreign, and her owners residing abroad, though there was a consignee here, who had funds of the owners arising from the sale of the cargo; Judge Bee decided that "this being a transaction on land, the vessel not being on a voyage, but unladen and the cargo sold; and the owners being represented on the spot, by their consignee, who has in his hands ample funds arising from the sale of the cargo; no such invincible necessity exists, as the laws of all commercial countries seem to require, in order to vest jurisdiction in the admiralty." In the opinion given by Judge Story in the case of The Jerusalem (2 Gallison 345) decided in 1815, he has bestowed his accustomed learning and powers of investigation upon this subject. He adverts to the distinction between the question of jurisdiction and that of lien. He has no doubt of the jurisdiction of the admiralty over suits in favour of material men; the subject matter making it a maritime contract, and over all such the admiralty rightfully possessing jurisdiction. On the question for repairs to a ship, he holds that in cases of foreign ships, or of ships in foreign ports, a lien is created by the maritime law; but, he adds "whether, in a case of a domestic ship, materialmen have a lien for supplies, and repairs

furnished at the port where the owner resides, I give no opinion; there are great authorities on both sides of the question" In the case of The Aurora (1 Wheaton 96) decided in 1816, the same Judge, delivering the judgment of the Supreme Court, says "it is undoubtedly true, that material men, and others, who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the admiralty to enforce that right;" and the general tenor of his opinion seems to limit this right to foreign ships, although not so expressly decided. We are however relieved from all embarrassment, in the case before us, by the decision of the Supreme Court in the case of The General Smith, (4 Wheaton 438,) in which it is said that "where repairs have been made, or necessaries have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem* in the admiralty to enforce his right. But in respect to repairs and necessaries, in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied unless it is recognised by that law." In a note to the same case it is said that "this lien, existing by the local law, may be enforced by a suit *in rem* in the admiralty."

By an Act of the Legislature of Pennsylvania, passed on the 27th March, 1784, "Ships and vessels of all kinds, built, repaired and fitted within this state, are declared to be liable and chargeable for all debts contracted by the masters or owners thereof, for or by reason of any work done or materials found or provided, for, upon, or concerning the building, repairing, fitting, furnishing and equipping such ship, in preference to any, and before any other debts due and owing from the owners thereof."

Upon the provisions therefore of this municipal law, and the principles laid down by the Supreme Court, in the case cited, it is ordered that, out of the funds in the hands of the mar-

shal proceeding from the sale of the ship Thomas Scattergood, there be paid to Michael and J. Brown fifty-three dollars and forty-four cents, and to William Ker, ten dollars and seventy-five cents.

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DAVIS AND BROOKS, OWNERS OF ONE HALF OF THE BRIG SENECA,

*v.*

THE BRIG SENECA, AND CAPTAIN HENRY LEVELY, OWNER OF THE OTHER HALF.

1. Where one of two part owners, who have equal interests in a vessel, declares his intention of taking her to sea, and offers to make stipulation for her safe return, a Court of Admiralty will not, on an application of the other part owner, grant a compulsory order of sale, or permit him to send her to sea with a master appointed by himself.
2. The provisions of the French commercial law which authorise a compulsory sale of a vessel, in case of partners disagreeing about the use of her, are to be regarded rather as municipal regulations of that country, than as the general law of Admiralty.
3. The English courts of Admiralty claim and exercise no power to compel a sale of a vessel, on the application of part owners who object to a contemplated voyage, but they will require stipulations in favour of the dissenting owner of a vessel for her safe return.

ON the 5th December, 1828, the complainants in this case filed their petition, setting forth the following facts: That the petitioners are owners of one half part of the brig Seneca, now lying in this port; that the remaining half part belongs to Captain Henry Levely, who has had possession of the brig for several months, with the sole control of her: that he has proceeded on several voyages to the loss and dissatisfaction of the late owners, from whom the petitioners purchased the brig: that he now threatens to take the vessel to sea without their consent, and to their great detriment: that they have repeatedly offered to sell

their share to Captain Levely at a reasonable price; or to purchase from him; or to sell the entire vessel at public auction; or to send her to sea with a master to be appointed by themselves; but that Captain Levely obstinately refuses all these propositions, and persists in saying that he will take the brig to sea. The prayer of the petition is for an attachment against the vessel, and a citation to the captain to show cause why the court should not grant an order for the sale of the brig; or why they should not be permitted to send her to sea with a master appointed by themselves. The attachment and citation were awarded. The respondent admits the ownership of the vessel, as stated; that he is in possession of her; that he has taken her on several voyages, and means immediately to take her to sea; and asserts that the petitioners have no remedy or right, but to require of him to give security for her safe return, which he is willing and ready to do.

On the 12th December the case came on for hearing before Judge Hopkinson, and was argued by T. I. Wharton for the complainants; and by Chauncey for the respondent, who agreed to the leading facts set forth in the petition, and submitted to the jurisdiction of the Court, but contended that the only remedy for the complainants, was to require of the defendant to give satisfactory security for the return of the vessel.

T. I. Wharton for the complainants.

The complainants have made every effort to obtain a sale of the vessel, having offered to buy or sell at a reasonable price. In such a case the admiralty has a right to order a sale. The complainants and respondent are part owners of the brig: she is now here under the power of the court, and the respondent intends to take her to sea, against the will of his partners.

The present application is novel in this court, nor has the question been decided in any court of the United States. It therefore lies upon us to show clearly, first, that this court has the power to grant the prayer of the petition, and to direct the sale of the vessel; secondly, that it has the power to take her out of the hands of the respondent and put her into the hands

of the complainants on their giving security; and thirdly, that the facts of this case call for the exercise of this power.

I. To direct a sale. The petitioners have no remedy at common law; no attachment will lie, as the respondent is a resident here; nor can a part owner maintain trover against his partner; nor will a replevin lie. Perhaps in England, chancery would give an injunction; but as we have no court of chancery in Pennsylvania, the reason is the stronger for restoring to the admiralty its old, original jurisdiction.

We contend, therefore, on the part of the complainants. 1. That the maritime courts of the continent of Europe have possessed, and still possess this jurisdiction. 2. That the English Admiralty possessed it for a long period without dispute, and perhaps still possesses it. 3. That whatever may be the case in England, our courts possess an enlarged maritime jurisdiction, and this case is within it.

1. The germ of the maritime law of all Europe is found in the Roman civil law. It contains provisions on the subject of part owners, that are embodied in the earliest known ordinances. These establish the positions, that if a master who is part owner sells, the other owners may take the shares at a valuation; that where the interest is equally divided one may compel the others to sell; and that if the major part of the owners refuse to fit out a vessel she is to be valued and sold. Laws of the Hanse Towns, Art. lvi.; Ordinances of France, tit. iv. art. vi.; French Commercial Code, § 220; 1 Valin Commentaries, 584; 1 Molloy de Jure Maritimo, 311; 2 Brown's Civil and Admiralty Law, 131, 406; 1 Peters Ad. Dec., cix.; 2 Peters Ad. Dec., xvii., lxvi.

2. Originally the English maritime courts possessed the same powers as those of the rest of Europe, and until the year 1745, no decision is to be found which denied the right of the admiralty to compel a sale by one part owner of a vessel. That decision, in the case of Ouston v. Hebden, was made before the common law courts had recovered from their horror of the admiralty, which has since greatly passed away. Hall's

Ad. Prac. viii. xvi. 10, 87; Beawe's Lex Mer. 51; 1 Molloy de Jure Mar. 311; Ouston v. Hebden, 1 Wilson, 101; De Lovio v. Boit, 2 Gallison, 406, 438, 462; Holt on Shipping, 360, 364.

3. Whatever may be the opinions of judges in England, the admiralty has the power here; our courts possess an enlarged admiralty jurisdiction, extending under the third article of the Constitution to all cases of admiralty and maritime jurisdiction. The admiralty courts of the United States, therefore, have all the jurisdiction of the English courts at an early period, and all which the continental courts still exercise. The power now claimed is within this, for it was possessed formerly by the English, and is now possessed by the continental courts. The law is the same in France now; admiralty jurisdiction extends over all matters relating to owners of vessels, and in cases where partners differ they are to be settled by the laws of the sea. Judges Story, Winchester and Peters have all held that the admiralty jurisdiction is more extensive here than in England; and even there all the cases, except the single one of Ouston v. Hebden, assert the jurisdiction of the admiralty generally over part owners of a vessel. The jurisdiction over the subject matter implies a right to order a sale; the question is only as to the expediency. Constitution U. S. art. iii. sec. 2; Hall's Ad. Prac. xvii.; 5 Wheaton, 115, note; De Lovio v. Boit, 2 Gallison, 467, 468, 471, 472; 1 Peters Ad. Dec., 7, 235; 2 Peters Ad. Dec. 290; 6 Hall's Law Journ. 557, 576.

II. The court has a right to put the vessel into the hands of the petitioners on their giving security. The same reasoning and authority apply to this point as to the preceding. When the part owners disagree, the court have a right to order the vessel to either. Where one part owner is master, there is a greater reason for giving the vessel to the other part owner. The master, if allowed to take her, may commit barratry, and other frauds, which the other owners cannot; and this the maritime law understands when it provides that owners may

dismiss a master on paying him for his share. If this is the maritime law of Europe, as it certainly is, it ought to be the law here. In this case both of the part owners apply to send the vessel out, and if the permission is to be granted to one or the other, it seems more properly to belong to the complainants. 1 Valin, 572; 1 Peters Ad. Dec., xcix.; 2 Peters Ad. Dec. vi.

III. That the circumstances of the case require the court to grant that petition, is established by the allegations contained in it and not denied by the respondent, as well as by the testimony that has been produced.

CHAUNCEY for the respondent.

The case is not, that the respondent desires a voyage to which the complainants will not agree, but they would prevent a voyage which the defendant proposes to make.

We deny the jurisdiction and power of the Court to order the sale; or to take the vessel out of the possession of the respondent, and deliver her to the petitioners. The only remedy for them is to let her go on the proposed voyage and take stipulations for her return.

The argument *ab inconvenienti*, and a failure of remedy at common law, would apply to any other property or chattel as well as to a vessel.

This power as now claimed has never been exercised in the United States; nor is properly an admiralty power; it has been frequently repudiated in England in the maritime as well as in the common law courts. The jurisdiction of the admiralty relates to matters happening on the high seas, or in their nature, having reference to the sea; but no law shows that it extends over all ships or all owners of ships. It is true the courts exercise a power over the employment of a ship; but not over the ship itself; or because it is a ship. In relying on the principle of the civil law, that in case of joint ownership of a chattel, the opinion of a majority shall govern, it should be remembered that it is purely one of the civil law, but does not go into the admiralty. So of the French regula-

tions, they are special and part of their civil law, not that of admiralty. They are founded on a positive enactment or provision of their code, and not on the principles of the admiralty law. The only principle borrowed by the admiralty from the civil law is that a majority shall govern. Formerly one part owner could not sell his share, without the consent of the other, until the ship had made a voyage, with other restrictions and limitations. 2 Brown Civ. and Ad. Prac. 34. De Lovio v. Boit, 2 Gallison, 406.

There is no such principle as that the admiralty has the power of sale. If there be a majority they prevail; if not, then the right is with those in possession, or who desire to send her to sea. In the latter case the opinion favourable to occupation ought to prevail.

The ordinance of Louis XIV introduced a new principle into the civil law of France. That a majority of part owners shall give the law, is the general principle of the civil law of chattels; but the right of sale, on an application of a moiety of the interest is not a principle of the civil law. It is a positive enactment of the French code; and the manner in which a public sale may be demanded, is expressly provided for. It becomes a right when demanded by a moiety.

The authorities since that have been cited, show no such principle as that contended for, nor any power of sale, except in in the case of a majority. None show that in case of equal owners differing as to the employment of a vessel, one may demand a sale; a ship is upon the same footing with other chattels, except as to her employment; and why should she be taken out of the possession of one owner to be delivered to another, holding the same interest in her. The complainants propose to take the vessel and give us security; why should they not leave us the vessel and take our security? Laws of the Hanse Towns, Art. 59. Usages of the sea, 178. Laws of Wisbuy, Art. 64, 65, 66. 1 Valin, 584. Ordon. of Louis XIV, Tit. 4. Art. 5. 1 Boulaypaty, 339. 1 Molloy, Book 2. ch. 1. § 3.

Beawe's Lex Mer. 51. 1 Holt on Shipping, 363. The Apollo 1 Haggard, 306. Ramsay v. Allegre, 12 Wheaton, 611. Clinton v. The Hannah, Bee, 419. Shrewsbury v. the Two Friends, Bee, 432.

T. I. Wharton for the complainants in reply.

By maritime causes are understood persons or things belonging to the sea. Hall's Adm. Pr. 12. The General Smith, 4 Wheaton, 442. Ramsay v. Allegre 12 Wheat. 611, 640. 5 Wheat. 115, note.

The case is of the first impression here; it asks for the exercise of a power which no case has shown that the English admiralty courts have ever disavowed. The French ordinances and the commercial code are evidences of the general law, rather than municipal regulations; and though we admit that the provision contended for is not found in terms, any where but in the French ordinances and code, yet we have endeavoured to show that it is a principle, not a mere arbitrary enactment.

In regard to the English authorities cited, it is to be remembered that they refer to a restrained jurisdiction; ours is one expressly enlarged by the Constitution; but in fact except the case of Ouston v. Hebden, the peculiar feature of which has been noticed, there is no one denying the power of which we ask the exercise.

As to the two American cases they were both decided previously to the present constitution, and under the peculiar enactments of the state laws.

In regard to the relative superiority of the claims of the parties, it may be sufficient to say that the possession on which the respondent rests is that of master; of an agent, not a part owner.

On the 23d December, Judge Hopkinson delivered the following opinion:

When a cause is to be decided, which involves in it an important and extensive principle of jurisprudence, it is a great

satisfaction to the judge to feel assured that he has been furnished with all the aid that professional knowledge and industry can afford.

In this case no pains have been spared to elucidate the subject, by researches into the learning of the past as well as the present age; and I regret that the urgency, which calls for a speedy decision, has prevented that critical examination of some of the books referred to, in foreign languages, which I should have made, if more time could have been taken for it. I do not, however, come to the decision of the case, without a careful and sufficient acquaintance with the authorities cited.

The petition is filed by Davis and Brooks, merchants of the city of New York, who state that they are owners of one-half of the brig Seneca, now lying in the port of Philadelphia, and that the remaining half part belongs to Captain Henry Levely. That Captain Levely has had possession of the brig for several months, having the sole control thereof; and has proceeded on certain voyages to the detriment and dissatisfaction of the late part owners, (from whom the brig was purchased by the complainants,) and now again threatons to take the vessel to sea without their consent, and to their great detriment. They go on to state, that, finding themselves in a very inconvenient situation by the conduct of Captain Levely, they have repeatedly offered to sell their share to him at a reasonable price; or to purchase his share on sufficient terms; or to sell the entire vessel at a public sale; or to send her to sea with a master appointed by themselves; but that the said Captain Levely has obstinately refused to adopt either of these courses, and persists in declaring that he will take the vessel to sea.

The complainants, in consideration of these circumstances, pray for an attachment against the brig, and a citation to Captain Levely to show cause why the court should not grant an order for the sale of the said vessel, or why they should not be permitted to send her to sea with a master appointed by themselves.

The attachment and citation were granted; and the case has been argued on the two remaining prayers of the petition.

The respondent admits the ownership of the vessel as stated in the petition; that he is in the sole possession of her; that he has heretofore proceeded in her on certain voyages; and that it is his intention immediately to take her to sea; but he denies that this case affords the court any jurisdiction, either to order a sale of the vessel, or to take her out of his possession; and he asserts that the only right and remedy of the petitioners are, to require of him to give them the usual security for the safe return of the vessel, before he takes her to sea against their consent, which he is willing and ready to do.

The counsel of the complainants has taken a very wide range over the ancient and modern powers of the admiralty, in England and on the continent of Europe, to establish the right of this court to order the sale of a vessel in cases of partners disagreeing about the use of her; and the respondent has peremptorily denied the jurisdiction of the court to compel a sale for any such reason, under any circumstances. It is for me only to decide the case presented to me; which seems not to call for the adoption of doctrines so broad and universal as those which have been spread in the argument. I am not now required to give an opinion upon an abstract question of law; nor to say whether a case may not occur or be imagined, in which the admiralty might direct the sale of a vessel, held under its jurisdiction, either as a direct or incidental power. My inquiries will be limited by the case of the complainants, and their right to the remedies they pray for.

The parties in this transaction are truly placed in a most inconvenient position; but it results from the inevitable consequences of the contract they have made with each other. While the law would not impose injustice, or injury upon any one, it cannot undertake to save men from all the losses and inconveniences to which they may be exposed, in the connections they form in business or friendship; from the respon-

sibilities and dangers they may incur in their various relations in society. The hardship of this case, on whichever side it may fall, is no ground of complaint against the law, which gives all the protection it can, but cannot always preserve men against themselves and their own acts. In the connections they form, they can, in many cases, have no other security than the discretion and good faith of those in whom they confide, and to whom they commit themselves.

The complainants have insisted, in support of their claim for an order of sale, on the following points:

I. That the maritime courts of the continent of Europe have possessed and still possess this jurisdiction.

The direct authorities relied upon for the support of this doctrine, may be resolved into the passages cited from Molloy, and the sixth article of the second book, title eighth of the French Ordinances with the commentary of Valin (page 584). Brown's Civil and Admiralty Law, Beawe's Lex Mercatoria, and other books have been referred to, but they merely repeat the paragraphs of Molloy, without any additional authority. Other authors cited, of an older date, speak only in general terms of the extent of the admiralty jurisdiction, without specifying the case now under consideration. In examining, therefore, the passages of Molloy, and the pages of Valin, we shall probably omit nothing material to this first point.

As to Molloy, I am compelled to say, that it appears to me that this learned and respected jurist has involved himself, or at least his reader, in some confusion and uncertainty on this subject. In book second, chapter first (page 219) after giving us the sentiments often referred to by subsequent writers, that "ships were invented for use and profit, not for pleasure and delight; to plough the seas, not to lie by the walls," he adds, that "therefore the major part of the owners may, even *against the consent*, but not without the *privity* and knowledge of the rest, freight out their vessel to sea." Here the principle is announced, which is now adopted and acted upon in the admiralty of England and this country, as

well as of the continent; requiring, however, security, for the dissenting owners, for the return of the vessel. He proceeds; "if a major part," and here he refers to numbers, "protest against the voyage, and but one is left that is for the voyage, yet the same may be effected by that party, especially if there be equality in partnership;" by which, I understand, he means to say, referring not to numbers but to *interest*, if the one dissentient owns as much of the vessel as all the others. The word "especially" would leave us in uncertainty as to what may be done in cases, where a majority in interest are opposed to the voyage, if another passage did not explain it. In a subsequent page he tells us, that "if it should fall out that the major part of the owners refuse to set out the vessel to sea, then, by reason of the inequality, they may not be compelled; but then such vessel is to be valued and sold." We seem now to have two cases provided for; the first, of an equality of interest in the ownership, between those in favour and those against the voyage, in which case it may be effected even by a minority of numbers; and the second, of a majority in interest opposed to the voyage; in which case the voyage may not be effected, but the vessel shall be valued and sold. So far we would charge the author only with the want of a lucid and precise explanation of his meaning. But what shall we say of the following paragraph. "If it falls out that one," without stating his proportion of interest, "is so obstinate that his consent cannot be had, yet the law will enforce him either to hold or sell his proportion." Now that he must hold or sell is an inevitable alternative in every case, and requires no enforcement of the law. It is probably intended, that the law will put him to his election, "but if he will set no price, the rest may out-rig her at their own cost and charges." Is this to be the course in every case, when one withholds his consent to a voyage, without regard to the quantity of his interest, whether more or less, or equal to the others, for no such distinction is noticed? I would presume that the one partner refusing, must be inferior in interest, as well as numbers, to his

copartners; but there is a perplexing obscurity in all that this writer has said upon the subject. The interpretation of all the passages may be this. If there is an equality of ownership, the voyage is to proceed: but why "especially?" If there is a majority against the voyage, the vessel is to be valued and sold. If the majority is in favour of the voyage they may fit her out at their own charge; having reference in every case to the interest. How shall we apply the doctrines of this authority, as we understand them, to the case before us? It is not a case of a majority, in number or value, desiring to send the vessel, and opposed by the minority; but of an equality of interest, one insisting on sending her to sea, the other objecting, and in such a case, says Molloy, the voyage "may be effected" by the party who would employ the vessel. It is not asserted, by the authority, that in this case, an order of sale would be granted, because it falls within the more convenient remedy of "effecting the voyage," under proper responsibilities to those, who object to it. The compulsory sale is resorted to only when the majority object to the employment of the vessel, and may not therefore be compelled to undertake it; and then, in order that the ship, in which the public commerce claims an interest, may not be lost and "lie by the walls," the court, on motives of public policy, and not to cure improvident contracts, or serve individual convenience or interests, assumes the high authority of forcing a man to a sale of his property against his consent, at a price not under his control.

It will here be observed, that I consider this to be a case in which the dissenting owners "protest against the voyage," but propose no other employment of the vessel. It is true, the complainants say that they have offered to send her to sea, with a master to be appointed by themselves; which is imposing a condition on the other owner, unjust and unreasonable, and not to be affirmed by the court, if it had the power to do so. It cannot be held to be a case of mere difference between the part owners about the voyage to be undertaken. The case now to be decided does not appear to me to be such as, even under the

doctrines of Molloy, would authorise the court to order a sale of the vessel; and if it were so, I should hesitate to assume a power never exercised by any court of admiralty in the United States or in Europe, on an authority so deficient in precision and perspicuity.

The sixth article, cited and commented upon by Valin, (p. 584,) may be thus translated: "No one can compel his partner to proceed to the public sale of a vessel held in common, unless opinions be equally divided about the undertaking of some voyage," or "of any voyage." I would not appear to be fastidiously critical, but am constrained to say, that this article is not to my mind clear of ambiguity. Is it absolutely clear, whether by the exception, "unless opinions be equally divided about undertaking (quelque) *some* or *any* voyage," we are to understand that the sale may be compelled, when the partners differ about some particular voyage proposed by part of them, while the other part propose another, differing therefore about *some* voyage, that is, about which shall be undertaken? Or does it mean that the sale shall take place, when the parties differ about undertaking *any* voyage at all: one proposing to send the vessel to sea, and the other to keep her at home? The commentary of Valin gives us his understanding of the text, which is, that the right of compelling a sale exists in two cases: first, when the partners differ about the particular voyage to be undertaken, both, however, desiring to employ the vessel; and, secondly, when the objecting party does not propose any voyage as a substitute for that he opposes, but offers plausible reasons for his opposition. This is very reasonable, but no clue to it is to be found in the text of the ordinance.

The cases, in which a difference among partners on this subject may happen, seem to be;

1. When one partner proposes a voyage, and the other refuses his assent to it, but neither proposes another, nor gives good reasons for his refusal. In this case, the exception of the ordinance, which implies the power to force a sale, has no application, and the dissenting owner cannot be so constrained;

because, the public commercial policy, looking only to the employment of the ship, does not require it, inasmuch as the willing partner may send her to sea, on giving security to the other owner for her safe return.

2. When both owners are desirous of employing the ship, but cannot agree about the voyage; then, as neither comes under the interdiction of wishing to keep her, "to lie by the walls," the power to order a sale is brought in, to settle the difference and save the property to both of the parties, as well as for the public use. The commentator truly remarks, that, "under such circumstances, the court cannot take cognisance of the subject of dispute;" that is, cannot decide in favour of one or the other voyage, and pronounce which would be most beneficial and prudent, and ought to be preferred; therefore, in the language of Valin, "there is naturally no other mode of putting an end to the dispute or difference of opinion."

3. When the dissenting partner does not propose another voyage, but offers good reasons for objecting to that proposed: here, under Valin's construction of the ordinance, a sale will be ordered for similar reasons to those above given. The court will not send the vessel to sea against the consent of an owner, who "sustains his dissent by plausible reasons;" nor will it deprive the other owner and the public of her use, by keeping her unemployed, on a difference of opinion, which they cannot settle, and may be endless. The court, therefore, from a sort of necessity, cuts the knot by dissolving an injurious and embarrassing connection.

Does the case of the complainants fall within the power of ordering a sale, as given by this ordinance, explained, as it is, by the commentator, with a very large and liberal interpretation? They propose no voyage as a substitute for that they object to; for, I repeat, I cannot consider their offer to send the brig to sea, on condition that they shall have the exclusive appointment of the master, to be such a proposal as should be regarded on this question; no intimation is given of when or where they would send her; no voyage designated.

The remaining case of Valin is, where the dissenting owner offers plausible reasons for objecting to the voyage proposed. The objection of the complainants, as stated in their petition, and offered to be more circumstantially proved, is not to the particular voyage on which this vessel is about to be sent, as being unprofitable or hazardous, but to her going any where in the possession and under the command and control of the defendant. We fall here into another ambiguity or difficulty in the meaning of the commentator. Must we take him literally that the objection must be made to the voyage in question? Or may it be extended to the master, the mariners, the condition of the vessel, in short to any thing in relation to the vessel or voyage? I shall offer no opinion upon this question of construction, because, taking the commentary in its most enlarged sense, I should not feel myself to be bound by it, or authorised to adopt it as the law of this court, unless, on another point of this case, I shall find it to have been extended to this country. At present I consider it as a local municipal regulation of the country enacting it, and partaking, more or less, of the general jurisprudence and policy of that country.

If, then, the objections or reasons, set up by the complainants, as the ground of their application to the power of the court, are not of the description alluded to by Valin, they stand in the third position of an owner dissenting to an intended voyage, but neither proposing another, nor "offering plausible reasons" for his dissent; and, in such case, his remedy is not by forcing a sale of the vessel, but by requiring security for her safe return.

II. The second point made for the petitioners, on the question of sale, is that the English courts of admiralty possessed this power for a long period, and, perhaps, still possess it.

On the first branch of this point, that the English courts once possessed this power, no authority has been produced beyond very general expositions of admiralty jurisdiction. Molloy does not propose, in his treatise, to give the law of England on admiralty jurisdiction, on the contested questions

in relation to it. He expressly disavows it, saying, "in the whole work I have no where meddled with the admiralty or its jurisdiction (unless, by the by, as incidentally falling in with other matter) knowing it would have been impertinent and saucy in me to enter into the debate."

Judge Story in the case of De Lovio v. Boit (2 Gallison 400,) says; "What was originally the nature and extent of the jurisdiction of the admiralty cannot now with absolute certainty be known." I assuredly will not attempt to illustrate what was hidden from him; nor do I think that a knowledge of what was the constitution of this court, centuries ago, under all the changes that have taken place in commerce, national intercourse, and municipal jurisprudence, should govern us at this day. Whether the power now claimed for the admiralty was formerly possessed by that court in England or not, I must leave in the uncertainty and obscurity in which ages of darkness have involved it; but it seems to me to be sufficiently clear, that the suggestion that the admiralty in England still possesses it, is altogether without foundation. The case of Ouston v. Hebden, (1 Wilson, 101,) is full and direct to the point, that the admiralty has no power to compel a sale of a ship, on the application of a part owner who objects to a contemplated voyage. It may compel security to be given to the dissenting owners, but cannot force a sale upon them, or require of them to buy the shares of the others. I have not found any disapprobation of this doctrine, either by the court of admiralty or by any English writer on the civil and admiralty law; on the contrary Brown, no mean advocate for admiralty jurisdiction, gives the case of Ouston v. Hebden in his well known work, without any kind of disapprobation. Lord Stowell, in the case of The Apollo, (1 Haggard, 306,) after stating the right of requiring stipulations, in favour of the dissenting owner of a ship, for her safe return, adds, "there is no case, either within the scope of my own inquiry, or which has been discovered by the diligence of the advocates, upon repeated challenges given them for that purpose, in which the court

has moved beyond these limits." I feel therefore fully warranted in saying that a court of admiralty in England does not possess or claim the power now contended for.

III. But if the complainants are right in their third point, they must prevail; to wit, that whatever may be the case in England, our courts hold an enlarged maritime jurisdiction; and with it, the power now asked to be exercised. The proposition, that the admiralty powers are or ought to be more enlarged in this country than in England, is too general to bring us to the specified conclusion now required; it should be further shown that the enlargement comprehends the power in question. The general ground is a good foundation to build upon, but the materials of the fabric must be obtained from established principles and precedents.

In the first place it is not pretended, that this power has ever been exercised or directly asserted by any court of admiralty in the United States. When I am called upon to wield a power never before used, or directly claimed by any court of admiralty, in England or in our own country, the right should be made exceedingly clear, from acknowledged principles and unquestionable deductions; and if any difference exists between the law of the United States and that of England, on the subject, arising from the nature of our political or judicial institutions, it should be brought home to the question, before the court can presume to add such a power to its jurisdiction. The courts of admiralty in England may have been, at one period, too much constrained by the watchful and rigorous jealousy of the common law, but, on the other hand the civilians have not been without ambition to extend their dominion; and, having the field very much to themselves on the continent, they may draw us over a wide range, if we follow them implicitly. By hastily disregarding the doctrines of the English courts, in favour of the apparent convenience of the civil law, we shall disturb the harmony of our system of jurisprudence, which has been essentially derived from that of England, and follows it in its leading arrangements.

Let us be governed by a sincere desire to direct and regulate both jurisdictions by the great ends of public convenience, and individual justice, without rashly removing established limits and landmarks.

How have the complainants proved that the admiralty courts of this country possess a jurisdiction so enlarged as to embrace the power, now expected to be used in their behalf? They have not shown any actual exercise of such a power, nor any assertion of it, but have endeavoured to deduce it from some general observations made by most respectable judges; to wit, Judges Story, Peters and Winchester. If, indeed, such names shall be found to support their pretensions, they will be strongly fortified.

The general expressions of Judge Peters, in the case of Jennings v. Carson, (1 Peters Adm. Dec. 7,) that, "acting in a national, and not a dependent capacity, I cannot conceive that we are bound to follow the practice in England, more than that of our own, or any other nation," furnish nothing by which we can obtain the least hint of his opinion upon our question. In the case of Willings v. Blight, (2 Peters Adm. Dec. 288,) a petition was preferred to permit the majority of owners to proceed with the brig Amelia on a certain voyage, after giving stipulation for the value of the recusant owner's share. The court clearly thought the case was one of admiralty jurisdiction. It is stated that the recusant owner would neither sell at a reasonable appraisement, nor make advances for the outfit. The judge says that, "whether a minority (the case of equality is not given) shall or shall not be compelled to sell, has not been here judicially decided." He then quotes passages already noticed, from Molloy, taking them from the Treatise on Sea Laws and Beawe's Lex Mercatoria, into which work they are carried from Molloy. The judge, however, is so far from intimating an opinion that a compulsory sale is the proper remedy for the obstinacy of a recusant part owner of a ship, that, in conclusion, he says, "a privation of freight, the fruit and crop of shipping, seems therefore to be an appropriate mulct on indolent,

perverse or negligent part owners." He adverts to no distinction of majorities or minorities.

Nor can I discover in the laborious and learned investigation of admiralty jurisdiction, by Judge Winchester, in the case of Stevens v. The Sandwich, (1 Peters Adm. Dec. 233,) any thing which warrants us in concluding that he maintained that jurisdiction to the extent now claimed. He says that "a dispute between part owners, whether a ship shall be sent to sea, is cognisable in the admiralty;" and assuredly so it is, but the manner in which the court may interfere in such case, is not suggested by the judge; and we must suppose he alludes to the usual and unquestioned mode of demanding security for those who dissent. The subsequent general view of admiralty jurisdiction, and the matters subject to it, are equally unsatisfactory to guide us to his opinion on the particular point here in dispute.

To show the approbation of Judge Story, of the doctrines of the counsel for the complainants, we are referred to his celebrated opinion in the case of De Lovio v. Boit, (2 Gallison 398.) I have carefully perused this profound and extensive investigation of the nature and extent of the admiralty rights and powers, which is certainly conducted with the most liberal disposition towards them, but I have seen nothing in it from which I can conclude, with the counsel for the complainants, that if this application were made to that learned judge, he would not hesitate to grant the prayer of the petition. In page 463 of that case, Judge Story says, that the admiralty exercises undisturbed jurisdiction, and entertains suits, first, for possession of ships, and, secondly, upon controversies among part owners as to the employment of ships. The distinction taken by the counsel of the respondent is here recognised. No intimation is given of any power in the admiralty to take a ship from one owner and deliver her to another; nor to compel an unwilling partner to sell his share at an appraisement to be made by others. The court will take care that she

shall be employed, and when the party desirous of employing her offers to his associate the usual security, both the policy of the law and the interest of the individual are sufficiently guarded and protected. I must confess that I do not see how this policy or this question can be affected by majorities or minorities of ownership, except so far as they may influence the judgment and discretion of the court in the exercise of its power. The doctrine of Valin is, that where there is a majority against the voyage, it shall not proceed by reason of the respect paid to the majority; and yet this majority are to be made to submit to the stronger compulsion of a forced sale of their interest. The reason, which is the foundation of this extraordinary interference of the court, applicable to no other joint property but ships, is, to prevent the obstruction of commerce and navigation, in which the whole community have an interest; but this reason cannot be applied to a case like the present, where the whole dispute between the owners is for the possession of the vessel, and the party actually in possession desires to send her to sea, and is willing to secure the rights of his associate. On what principle can we compel a sale of the vessel in such a case, even if it were admitted that, abstractedly, the power exists in the admiralty?

Too much time has already been occupied by me, on this occasion, or it might have been useful to have examined the various parts of Judge Story's opinion, which have been supposed to support the present application. It is not necessary, or I should not have omitted it, however prolix. The Judge certainly does reject decidedly, in which I concur with him, any binding authority of the common law decisions in England upon this subject. I agree with him that "we are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty, upon enlarged and liberal principles." But we are not to conclude from this, that we are to set no limits to it; or that we may do, under it, any thing that may seem to be convenient in any particular case; nor yet that we should not cautiously respect the English decisions by great and learned

men, tainted perhaps, but not blended or corrupted, by prejudice. We must look to established principles and precedents to guide us, and when the wisdom and experience of legislators and jurists have found it good and expedient for the public convenience, and the due administration of justice, to establish different tribunals for different subjects of controversy, giving to each its boundaries; it is the duty of those, who are called upon to administer the law, to do it in the manner prescribed to them; to keep within the allotted sphere of their operations; and not to believe, that because what is required of them may be convenient or just in itself, it may therefore be done by them.

What would be the opinion of the learned Judge on this case, we can only conjecture from his past adjudications; and in them there is nothing that directly or by inference bears upon it. It is worthy of remark that in his edition of Abbott on Shipping, the case of Ouston v. Hebden is twice referred to as authoritative law; and he does not intimate any disapprobation of the decision, or make a suggestion that a different law prevails, or ought to prevail, in the United States. Nor can this be attributed to inadvertence, as he has a note on this subject, in which he refers to the case of Willings v. Blight, and to 2 Brown's Civil and Admiralty Law, 131.

A few words will suffice for the second or alternative prayer of the complainants, that they shall be permitted to send the brig to sea with a master appointed by themselves; that is, that the respondent, an equal part owner with themselves, in full and lawful possession of the vessel, shall be wholly dispossessed of her, both as owner and master; and that she shall be put under the exclusive control and power of the petitioners. This has not been, and could not be, strongly insisted upon. It would be an exercise of power beyond even the sale of the vessel, for which no principle or precedent has been shown. In the case of a sale, the proceeds would come into the hands of the court for those concerned; but this application would deprive the respondent of a property, clearly his own, and a possession certainly lawful, to put both into the hands of those

whose rights and interests are no greater than his own; and from whom he can have no better security than he is willing to give them. In such circumstances his possession must prevail; and I know of no power in this or in any court to deprive him of it, and transfer it to his co-partners.

I mean to decide, only, the case in hand. On the questions, whether a minority shall or shall not be compelled to sell, said, by Judge Peters, to be undecided; or whether a majority refusing to fit out, shall be so compelled; or an equal owner refusing to give stipulations; I am not called upon to give my opinion, more direct than was necessarily incidental to the course of my argument.

On this case it is my opinion and decree, that neither of the prayers of the petitioners can be granted, and that their petition be dismissed with costs; and further that the respondent have leave to send the said brig to sea, first entering into stipulations for the safe return of the same.

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## Edward Wilson and John Richards,
## *v.*
## The Brig Mary, Dodd Master.

1. The master may confine a refractory seaman on board of his vessel, inflict reasonable personal correction, or discharge him without payment of his wages, according to the enormity of his offence.
2. The practice of imprisoning disobedient seamen in foreign gaols is of doubtful legality, and to be excused only by a strong case of necessity.
3. If the imprisonment of a seaman in a foreign port is improper, the expenses of it, or of the employment of a person in his stead, are not to be deducted from his wages.
4. The advice of an American Consul, in a foreign port, gives to the master of a vessel no justification for an illegal act.

The libellants were seamen on board of the American Brig Mary, which arrived in the harbour of Port-au-Prince on the

28th August, 1828, and remained there until the 22d October, following. On several occasions, while the brig lay in port, the crew were guilty of much insubordination, and the captain, after consulting the American commercial agent, as he alleged, caused the libellants to be confined in the common gaol. This was done more than once, and, the last time, for a period of three weeks, during which a person was employed to do their work. On the arrival of the vessel at Philadelphia on her return, the captain refused to pay the libellants the full amount of their wages, having deducted therefrom, and charged them with, the whole expenses incurred on account of their imprisonment at Port-au-Prince, and the sum paid to the person employed there in their stead. The present proceeding was instituted to recover the sum thus withheld.

On the 12th December, 1828, the case was argued by GRINNELL for the libellants, and PHILLIPS for the respondent.

Judge HOPKINSON delivered the following opinion:

The practice of imprisoning disobedient and refractory seamen in foreign gaols is one of doubtful legality. It is certainly to be justified only by a strong case of necessity. It is not among the ordinary means of discipline put into the hands of the master. I am inclined to think there should be danger in keeping the offender on board, or some great crime committed, when this extreme measure is resorted to. It should be used as one of safety, rather than discipline, and never applied as a punishment for past misconduct. The powers given by the law to the master, to preserve the discipline of his ship, and compel obedience to his authority, are so strong and full, that they can seldom fail of their effect: they should be clearly insufficient, before we should allow the exercise of a power which may so easily be made an instrument of cruelty and oppression, and may be so terrible in its consequences. A confinement in an unwholesome gaol, in a hot and pestilential climate, may be followed by death or some disabling disease.

In this case the libellants were taken from the prison when the brig sailed on her return; and although one of them

was able to do his duty, the other was prevented by sickness for the whole voyage. I would rather altogether deny a power which can be so seldom necessary, than trust it in hands, in which it is so likely to be abused, and so difficult to be regulated. The master may, without the aid of foreign police officers and dungeons, in which he cannot control, even if kindly disposed, the treatment of his men, take measures of great strength to enforce the discipline of his ship. He may there confine a refractory sailor; he may stop his provisions; he may inflict reasonable personal correction, according to the enormity of the offence and the obstinacy of the offender; and, if he be incorrigibly disobedient and mutinous, he may discharge him, and withal he incurs a forfeiture of his wages. A firm and judicious exercise of these powers can hardly fail of reducing the most perverse to obedience.

Without deciding the general question, whether the master of a vessel may, under any circumstances, imprison a seaman in the gaol of a foreign port, under the control and discipline of a foreign police and its officers, for the mere maintenance of his own authority, I will examine the facts of this case under the principles above mentioned. (The Judge thought the evidence was not such as to warrant the imprisonment, and proceeded.) If the imprisonment in this case was unauthorised, the men cannot be charged with the expenses attending it; especially with their boarding which the master was bound to provide. Nor is it just to forfeit their wages; or, what is the same thing, charge them with the pay given to another hand. They have been punished for their misconduct, by their imprisonment, and to inflict these penalties would be to double the punishment.

I will take this occasion to notice an error which, I fear, has frequently, as in this instance, misled our masters of vessels. They seem to believe that they may do any thing, provided they can obtain the assent of the consul to it; which assent consuls are apt to give with very little consideration. When the master, on his return, is called upon to answer for his con-

duct; he thinks it is enough to produce a consular certificate approving his proceedings; or to say, he consulted the consul, or acted on his advice. This is altogether a mistake. It is certainly a very prudent precaution to consult the consul, in any difficulty, and if the case were fully and fairly stated to him, and his advice faithfully pursued, it would afford a strong protection on the question of malicious or wrongful intention, but it can give no justification or legal sanction to an illegal act; nor deprive those, who have been injured, of their legal rights and remedies.

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DAVIS AND BROOKS, OWNERS OF ONE HALF THE BRIG SENECA,

*v.*

THE BRIG SENECA, AND CAPTAIN HENRY LEVELY, OWNER OF THE OTHER HALF.

1. An appeal lies from a decree of the District Court, refusing an order for the sale of a vessel, on an application by one of two part owners, who have an equal interest.
2. After an appeal, a vessel, which was the subject of the decree in the District Court, passes into the custody of the Circuit Court, and is no longer under the control of the former tribunal.

ON the 27th December, WHARTON, of counsel for the complainants in this case, moved for leave to enter an appeal from the decree of the court, rendered on the 23d December.

CHAUNCEY, for the captain and part owner opposed the appeal.

The complainants must show that the decree made in this case is a final decree, coming within the act of Congress. If the petition was for the sale, or possession of the vessel, it was in nature of a possessory action; it was an application to the court

for an order, which the court has decided it had no power to give. The twenty-first section of the act of Congress of 24th September, 1789, contemplates a final decree in a case in which the "matter in dispute is of the value of three hundred dollars." Is this such a final decree? Is it not rather, like the case of a debtor under the insolvent laws? (1 Story's Laws, 60.)

The former prayer of the complainants having been refused, I ask that, if this appeal be now allowed, the vessel shall be liberated from the custody of the officers of the court, and delivered to us on bail. The Guardian, 3 Robinson, 93. The Aurora, 3 Robinson, 133. The Ariadne, 2 Wheaton 143. The Grotius, 1 Gallison, 503.

WHARTON, for the appeal.

1. Does the act of Congress give an appeal in this case? 2. If it does, is it not a supersedeas to the entire decree, and can the court proceed or act upon that decree, as the foundation of a further order, such as the respondent has asked for?

I. The provisions of the act of 24th September, 1789, have been referred to; but by the subsequent act of 3d March, 1803, an appeal may be taken where the matter in dispute is of the value of fifty dollars. (2 Story's Laws 905.)

It is incumbent on us to show—1. That this is a final decree. 2. That the matter in dispute is of the value of fifty dollars.

1. It is certainly a final decree; for it concludes the matter in dispute between the parties. It decides the question raised between them. No further proceeding or decree can be had here in relation to it. It is not preliminary to any further action of the court upon the matter.

2 As to the value. One half of the vessel may be taken to be the matter in dispute; or the profits incident to that one half, which may be derived from the use of it. All suits in the admiralty are now for the possession of property; or, to establish liens. The right of possession is itself a subject or matter of profit and property. In an ejectment, the object is to obtain possession; yet error lies, and the value will be inquired into.

Sergeant's Const. Law, 40. Hall's Adm. Pr. 84. 85. M'Clung v. Silliman, 6 Wheaton, 598.

II. That an appeal is an absolute supersedeas to any further proceeding by this court, is not established. Sergeant's Const. Law, 43, 75, 136. The Collector, 6 Wheaton, 194. United States v. Wonson, 1 Gallison, 5. Anonymous, 1 Gallison, 22. The Grotius, 1 Gallison, 503.

CHAUNCEY, in reply.

There must be a substantial controversy between the parties as to the right of property or possession. The matter must be susceptible of valuation, and ascertained to exceed fifty dollars in value. In all cases submitted to the discretion of the court, and requiring an extraordinary extension of its power, no appeal is allowed; as in the case of the dismissal of an insolvent's petition.

On the 30th December, Judge HOPKINSON delivered the following opinion:

The petitioners and the respondent are the equal part owners of the brig Seneca. The latter being master, as well as part owner, had possession of her, and was about to take her to sea, against the consent of the petitioners. To prevent this, they applied to this court, praying that the court would either order a sale of the vessel, or take her from the possession of the respondent, and permit them to send her to sea, with a master to be appointed by themselves. The cause was argued on these points, the property being in the custody of the court, and no application was made by either party to make any other disposition of it, pending the hearing, or to make any order or decree concerning it, other than a final one on the petition. The court refused both of the prayers of the petition. The petition was dismissed, but a further order was made, preventing the respondent from taking the brig to sea, without giving bail to secure her safe return, for the other owners, in the usual manner. The petitioners now offer an appeal from this decree, which is opposed by the respondent, who also requires that if

the appeal be allowed, the vessel should nevertheless be discharged from the attachment, and restored to his possession, on his giving the usual bail to answer the appeal. On the other hand, it is contended by the petitioners, that the vessel must go with the appeal to the Circuit Court, in the situation in which she now is; and that this court can make no order to dispose of her in the mean time, its power over her being paralysed by the appeal.

The case may be called anomalous, and presents difficulties on every side. It is obvious that to remove the attachment from the brig, and restore her to the possession of the respondent, is to let her go to sea under his command and control, and to take from the petitioners all the benefit they may expect from their appeal; to continue her under the attachment, is to keep her not only in an useless but an expensive condition for all concerned. If the decree of this court should be reversed by the Circuit Court, how will the bail given by the respondent avail the petitioners in obtaining the object of their petition, to wit, a sale or delivery of the brig to themselves. The bail in such a case could not be a substitute for the thing? But if the vessel remains and passes into the custody of the Circuit Court, she will be ready to meet the judgment of that court, on the matter in dispute between the parties; that is, to be sold, or delivered to the petitioners, or to be restored to the respondent. When the dispute is about the ownership of property as in case of prize; or where a lien is claimed, as in a suit for seamen's wages; it is clear that bail may answer for the value in one case, and for the debt in the other. But in this case, there is no controversy about the ownership of the property, nor is the payment of any debt claimed from it; the whole dispute goes for the possession and we would take from the superior court the power to give the possession as it may adjudge to be right, if we do not give them the property of which the possession is claimed. In the case that has been mentioned of a libel against a vessel as prize, whatever might be done by the District Court, pending the proceeding, and

while the property is in the custody of the court, it seems, from the case of The Grotius (1 Gallison, 503), that after a decree pronounced in favour of the claimants and an appeal taken, the property cannot be delivered to them by the District Court on bail. So in the case of seamen's wages, though it has been the practice to relieve the vessel attached, on bail entered pending the suit, no such indulgence has ever been allowed, as far as I can learn, after a decree and appeal.

The counsel of the respondent has insisted that as there has not been, in the proceedings of this case, a strict attention to form, he should now have the same advantage of claiming the brig on bail, as if he had asked for it before the decree. The only informality has been that the answer to the petition was not reduced to writing and filed before the argument; but it was distinctly and substantially stated orally by the counsel for the respondent, and reduced the dispute to a point so clear and single, that there could not be, as there was not, any misunderstanding about it, either with the court or the counsel. To put it afterwards in writing and file it, was truly mere form. But we cannot say so of the claim to discharge the vessel from the process of the court, and return her to the respondent, which, so far from being matter of form, is the sole and substantial matter of controversy in the case. I would not be understood to intimate that such a motion would have been granted, in any stage of the proceeding in this case, so unlike those in which similar applications have been granted; but merely to say that I shall decide the question as it now comes before me.

An appeal is given from the decree of this court, when it is final, and the matter in dispute exceeds the value of fifty dollars. The appellants must have both these points in their favour. The decree in this case, in my opinion, was final: it dismissed the case from the court; it did all that the court could do with it; it decided finally, as far as it could, the matter in dispute between the parties. But it is further necessary that that matter should exceed the value of fifty dollars. Does this mean the subject concerning which the dispute arises; or the

question between the parties in relation to it? The subject here, about which the dispute has arisen, is a vessel, certainly of more value than that required by the act of Congress; but the question between the parties is not about the property or ownership of the vessel, but her possession and employment. What can we say is the value of this matter of dispute? In the case of the mandamus (6 Wheaton, 598) referred to by the petitioners' counsel, the salary, annexed to the office in dispute, furnished and was taken as a standard by which its value might be ascertained with sufficient precision. We have none such here. So in the case of an ejectment, which tries the title as well as the right of possession in the land, the matter in dispute is susceptible of a satisfactory valuation. The right of possession of this brig, the counsel of the petitioners say, is a matter of profit and property. If it be so, yet the question returns. What is its value? The answer depends upon unknown contingencies. Instead of being a source of profit, an object of value, the possession and use of the brig may be the means of misfortune and loss. It would be difficult to fix this question by affidavit. She may be employed on an unprofitable voyage; she may or may not be let to freight, and may therefore lie idle; or she may be let to freight, which in various ways may be lost, as the vessel herself may be. In this uncertainty, the vessel being clearly of a sufficient value and perhaps the true guide, I feel it to be my duty to incline in favour of the appeal, not only because it is a valuable right to the party, but from a proper delicacy in the exercise of my judicial authority, for which I should be solicitous not to claim too much. Besides, if the appeal is allowed, improperly, it will be dismissed by the Circuit Court, with less inconvenience, and delay than it could be compelled, if improperly refused.

The appeal being allowed, the question recurs, what is to be done with the vessel in the mean time? I have already substantially answered it. To deliver it to the respondent, or as he proposes, on bail, I repeat, would be to defeat the appeal, and render it an absolute nullity. It would be to execute

irrevocably the very sentence appealed from. But independent of the effect of such a proceeding in this case, so peculiar in its circumstances, the opinion of Judge Story in the case of The Grotius (1 Gallison, 503), fully confirmed by the Supreme Court in that of The Collector (6 Wheaton, 194) advises me that I have no power to direct it. "After an appeal" says the Judge, "the property is removed from the legal custody of the District Court, and is no longer subject to its interlocutory orders." Being removed from this court, it must follow the appeal and passes at once into the custody of the superior or Circuit Court; to whom any application about the disposition of it must be made. I am aware of the inconveniences of this course to the respondent, which, by the by, are shared by the petitioners, as this vessel, in which they are equally interested, must lie useless to all until the meeting of the Circuit Court. I regret these inconveniences, but can meet them only by the language of Judge Story, that "it will be for the legislature to remove them by giving authority to either of the judges of the Circuit Court to make any interlocutory orders respecting property in its custody."

The order of the court, in this case is, that the appeal be allowed.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

FEBRUARY SESSIONS, 1829.

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THE UNITED STATES OF AMERICA
*v.*
JOSEPH BELL AND WILLIAM J. BELL, EXECUTORS OF WILLIAM BELL.

1. The surety of a consul for the faithful discharge of his duties, and for his truly accounting for all moneys coming into his possession by virtue of the act of 14th April, 1792, is not responsible on account of moneys remitted to him for purposes not comprehended within his consular duties, as prescribed by that act.
2. In a suit by the United States against a surety, in an official bond, the burden of proof lies upon them, to show that the principal failed to discharge the duties of his office.

THIS was a suit on a bond dated on the 19th June, 1806, in which Maurice Rogers was the principal, and William Bell his surety. It appeared that Maurice Rogers had been appointed a consul of the United States in a foreign port, and the condition of this bond was, "that he should faithfully discharge the duties of his office, according to law, and also truly account for all moneys, goods and effects, which should come into his possession, by virtue of the act of Congress concerning Consuls and Vice-consuls."

On the 17th February, 1829, the case came on for trial before Judge HOPKINSON and a special jury. It was argued by INGERSOLL, District Attorney, for the United States, and BINNEY for the defendants.

The question substantially was, whether Maurice Rogers had truly accounted for all moneys received by him as consul. It appeared that he had received from the treasury of the United States, by several payments, the sum of three thousand and fifty-two dollars and sixteen cents, and he was credited with disbursements to the amount of one thousand three hundred and ninety-eight dollars and seventy-eight cents. The suit was brought for the balance with interest. It was contended, on the part of the defendants, that the money, thus paid to Rogers by the United States, was not received by him officially, as a consul; that it did not come into his possession by virtue of his office, or by virtue of the laws of the United States; that the law referred to, of 14th April, 1792, (1 Story's Laws, 235,) makes it the duty of consuls to take possession of the personal estate left by any citizen of the United States, who shall die within their consulates, leaving there no legal representative; but that no other money or effects, except in the case of a stranded vessel, are mentioned or intended by the act to come into his hands, or can, officially, and by virtue of the act, be in his possession. Of consequence, the condition of the bond taken under the act, has relation only to such moneys and effects as are specified, and not to any sums, which the treasury of the United States, for other purposes, and to any amount, may remit to their consuls.

Judge Hopkinson delivered the following charge to the jury:

The question, under the issues in this case, is, whether the money received by Rogers from the treasury of the United States, for which this suit is brought, came into his possession by virtue of his office as a consul of the United States, under the laws of the United States. If it did so come into his possession, it is not denied that he has not faithfully discharged the duty of his office, by truly accounting for this money: and that the bond is forfeited and the defendant liable.

By the fourth section of the act of 28th February, 1803,

(2 Story's Laws, 883,) it is made the duty of the consuls to provide for the mariners and seamen of the United States, who may be found destitute within their districts, sufficient subsistence, and passages to some port of the United States, "at the expense of the United States." The performance of this duty, which is strictly official according to law, and indeed prescribed by the act under which the bond was taken, obviously requires money, and it may be to a considerable amount; and from whence is it to be supplied, unless by the treasury of the United States? The consul acts but as the agent of the United States; the payments are to be made for and on their account; and no agent is bound to make advances for his principal, unless by a special contract between them. The United States are bound to furnish their consuls with the funds necessary to provide for destitute seamen, in the manner directed by their laws; and if the moneys, in this case, paid by the United States to Mr. Rogers, were paid to him for the purposes mentioned in the act, to be applied to the relief of destitute seamen, it is my opinion that they came into his possession by virtue of his office, and under the laws of the United States. But if they were remitted to him, for other objects and purposes, not comprehended within his consular duties, as prescribed by the act of Congress, under which the bond was taken; then, although he is a debtor to the United States for the amount due, they are not such moneys as the sureties in this bond can be called upon to account for. This is a question of fact for the decision of the jury. The account itself is the only evidence produced to show the nature and object of the advances; and they do not specifically appear there. The jury must, however, decide this matter by the light that is given to them.

A question has been made by the district attorney, on which party the burden of proof is thrown. I think it is on the United States. They assert and claim the forfeiture of the bond. They aver that Rogers received large sums of money; that he did not faithfully discharge the duties of his office; that he has not truly accounted for the moneys which came into his

possession by virtue of the act of Congress; and it is with them to show, what money did go into his possession by virtue of the act; what amount, which thus came into his possession, has not been truly accounted for; and in what he has not faithfully discharged the duties of his office. In short, they must make out their case against the defendant.

The jury found a verdict for the defendant.

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THE UNITED STATES OF AMERICA

*v.*

JOHN PATTERSON AND ELIZABETH HIS WIFE, AND DANIEL BRANLEY AND MARY HIS WIFE, ADMINISTRATORS OF GEORGE LEWIS LEFLER, DECEASED.

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THE UNITED STATES OF AMERICA

*v.*

CHRISTIAN BRENNEMAN, JOHN FORREY, AND MARY GOSSLER, EXECUTORS OF THE LAST WILL AND TESTAMENT OF PHILIP GOSSLER, DECEASED.

1. The auditor's report of a balance due from a person, accountable for public money, is a guide to the comptroller as to the amount to be sued for, but not evidence for the court of the debt.
2. A certified statement of a balance due, and the report thereof to the comptroller, is not such a transcript from the books and proceedings of the treasury, as may be given in evidence under the second section of the act of 3d March, 1797.

THESE were actions for debt on two bonds for twenty-five thousand dollars each, dated on the 14th October, 1799. George Lewis Lefler and Philip Gossler were sureties of Henry Miller,

the principal obligor in the bonds, and a supervisor of the internal revenue of Pennsylvania. On the final adjustment of his account on the 25th September, 1811, it appeared that there was a balance of five thousand and thirty-seven dollars and forty-four cents, due from him at the time of his death. To recover this balance these suits were instituted against the legal representatives of his sureties.

On the 18th February, 1829, the cases came on for trial, before Judge HOPKINSON and a special jury. They were argued by INGERSOLL, District Attorney, for the United States, and BINNEY for the defendants.

The district attorney, to support the claim, offered in evidence the following document, certified by the register, and authenticated under the seal of the Treasury Department.

No. 23,008. TREASURY DEPARTMENT.
*Auditor's Office, July 6th*, 1810.

I have examined and adjusted the account of Henry Miller, late supervisor of the revenue for the district of Pennsylvania, and find that he stands chargeable as follows, viz.

| | |
|---|---|
| To balance due on settlement of his account per report, No. 15,877, | $13,723 78 |
| Peter Muhlenburg for commission on $287, 908 47, (the amount of duties and bonds outstanding, and cash in hands of the collectors and inspectors transferred to said Muhlenburg) at $1 $\frac{18}{100}$ per cent. $3,397 32. | |
| Deduct amount charged on account of said commission per report, No. 14,504, $2,834 43, | 562 89 |
| Tench Coxe, acting as supervisor, for commission on $65 70, (the amount of the balance due from officers, transferred to said Coxe, per report, No. 15,877,) at 1 $\frac{18}{100}$ per cent. | |

| | | |
|---|---|---|
| which commission is to the credit of said Coxe, per report, No. 22,944, | | 77 |
| | | $14,287 44 |

I also find that he is entitled to the following credits, viz:

By amount of the following warrants in favor of the Treasurer, viz:

| | | |
|---|---|---|
| No. 1669 | $4,000 00 | |
| 1684 | 2,250 00 | |
| 1696 | 500 00 | |
| 1702 | 2,500 00 | |
| | | 9,250 00 |
| That the balance due the United States amounts to | | 5,037 44 |
| | | $14,287 44 |

As will appear by the statement and documents herewith transmitted, for the decision of the Comptroller of the Treasury thereon.

R. HARRISON, *Auditor.*

To GABRIEL DUVALL, Esquire, *Comptroller of the Treasury.*

BINNEY for the defendants objected.

This document is not evidence. Of the large sum of thirteen thousand seven hundred and twenty-three dollars and seventy-eight cents, no particulars are given. It is brought here as the balance reported from a former account, respecting the items of which no information is given, nor how this balance is made. The act of Congress of the 3d of March, 1797, makes a transcript from the books of the treasury evidence in suits between the United States and receivers of public money; but a mere certified balance of the account, in gross, is not a transcript from the books, within the meaning and objects of the act, which intended that the whole account should be submitted to the jury. (1 Story's Laws 464.)

There is besides another objection. If the transcript were full and in proper form, the act makes it evidence only against the principal debtor, or receiver of the public money, and not against his sureties.

Judge HOPKINSON, delivered the following opinion:

It is unnecessary to give any opinion on the second point, as the first is sufficient to exclude the evidence.

The first section of the act of Congress referred to, entitled, "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money," enacts, that when any revenue officer, or other person accountable for public money, shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, it shall be the duty of the comproller, and he is thereby required, to institute suit for the recovery of the same. The reported balance, thus made to the comptroller, is to be his guide and instruction for the amount he is to claim, and sue for, from the delinquent; and this is the whole office and effect of the report. It is the direction to the comptroller, but not the evidence for the court.

The second section of the act provides the evidence, which shall be received on the trial, in proof of the claim, if it is judicially resisted; and then we hear nothing of the report made to the comptroller, on which the suit is brought; but, for this purpose, it is declared, that "a transcript from the books, and proceedings of the treasury, certified by the register, and authenticated under the seal of the department, shall be admitted as evidence;" by which, I understand that the whole accounts, as they appear in the books; the elements out of which the reported balance is formed; together with all the proceedings, which have been had concerning them, shall be certified, and submitted to the court and jury, that they may judge, whether the sum or balance, for which the suit is brought, be fairly made up, and is justly due; that they may see and determine

whether any unfounded or illegal charges have been made against the defendant; or any credits refused or omitted, to which he is justly or legally entitled. A full transcript from the books, containing the accounts, and also of the proceedings of the treasury in relation to them, in admitting or rejecting disputed vouchers, charges, &c. are indispensable to these objects; they can never be reached by the mere exhibition of the balance apparent on an adjustment made, ex parte, by the officers of the treasury, and reported to the comptroller for his information of the amount claimed by the United States, and for which he is to bring suit; but which is the very matter complained of; the very adjustment appealed from, by the defendant.

The question to be tried by this jury is the correctness of this adjusted, reported balance; but if it is allowed to prove itself, what is to be tried? If a treasury certificate that such is the balance reported to be due, is enough to entitle the United States to a verdict and judgment for that amount, the trial is a mere pretence; an useless form which might be dispensed with, and the judgment entered at once on the production of the certificate. This cannot be the intention of the law. The whole cause of controversy must be put into the possession of the court, as it exists in the treasury department; and thereupon the court and jury will pass their judgment.

This construction is further manifest from the fourth section of the act. It directs that "no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury, for their examination, and by them disallowed in whole or in part." How appear? Assuredly by the transcript from the books and proceedings of the treasury. But these things will not, and cannot appear, and the defendant will be shut out from all the defence allowed him by the act, if it be sufficient for the United States to produce a certificate of the balance claimed by them, as reported by their accounting officers to their comptroller; which may not be impeached by denial, nor penetrated by adverse testimony; which cannot be opened to admit credits

unjustly refused, nor to withdraw charges unjustly made; which, in short, furnishes nothing to be tried. In other cases, we have seen the whole accounts transcribed and produced, which shows that it is not the usage of the department to give such transcripts as that now offered.

The evidence was rejected, and exceptions were taken by the district attorney.

The jury found a verdict for the defendants.

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THE UNITED STATES OF AMERICA

*v.*

HENRY KORN, ADMINISTRATOR OF JAMES HEPWORTH, DECEASED.

The legal principle, that actions arising ex delicto die with the person, is not changed or affected by the act of Congress which gives special bail in suits brought by the United States, for pecuniary penalties.

THIS was an action brought for the recovery of a penalty, alleged to have been incurred by the intestate in his life time, for a violation of the revenue law. The defendant admitted that the penalty was incurred by the intestate, but denied that it was recoverable from his administrator.

The case was submitted, on the question of law involved in in it, for the opinion of the court, and on the 20th of February 1829, was argued by INGERSOLL, District Attorney, for the United States, and KEEMLE for the defendant.

INGERSOLL, District Attorney, cited the act of 2d March 1779, sections 50, 65 (1 Story's Laws, 617. 630.)

KEEMLE for the defendant.

The act of Congress makes only those persons liable for the penalty who have been guilty of the offence. There

is nothing in it to extend it to the representative. The cause of action arises *ex delicto* and not *ex contractu*. The enactment, that the offender shall be held to bail to answer to the United States, is on a different principle from the surviving of the action to his representatives, and does not alter the nature or legal character of the action. 3 Blackstone Com. 302. 3 Bacon Abr. 97. 1 Comyn Dig. 461, tit. Administration, B. 15. Wheatly v. Lane, 1 Saunders, 216. Hambly v. Trott, Cowper, 375.

On the 27th February, Judge HOPKINSON delivered the following opinion:

This action is brought for the recovery of a penalty, alleged to have been incurred by James Hepworth in his lifetime, charging that he was knowingly concerned and aided in removing and securing certain goods, brought in a vessel from a foreign port, without having obtained a permit from the collector and naval officer, for such unlading and delivery. It is admitted that James Hepworth was guilty of this offence and was liable personally for the penalty. The only question is, whether an action for the recovery of it may be maintained against his administrator.

The English cases are uniform, confirmed by several in our own country, particularly in New York, that actions founded in tort or misfeasance, and arising *ex delicto*, die with the person. I do not think that the law, in this respect, is changed or affected by the circumstance, that the act of Congress gives special bail in actions brought by the United States for pecuniary penalties, which is the only ground taken by the district attorney to maintain his suit.

Let judgment be entered for the defendant.

## THE UNITED STATES OF AMERICA
*v.*
## THE MECHANICS' BANK OF THE CITY AND COUNTY OF PHILADELPHIA.

1. The proceeds of an execution out of a state court, being in the sheriff's hands, and claimed both by the plaintiff and by the United States, who were also judgment creditors, were paid to the former on his agreeing to pay them over to the latter, if 'the said court' decided they were entitled to them; held, that assumpsit for money had and received will lie at the suit of the United States, in this court, against the receiving creditor.
2. The priority of the United States gives no lien on property under execution when it accrued.
3. Levy and condemnation under an execution keep a judgment alive, and preserve the lien without a scire facias.
4. Land may be sold under a later judgment, without any impediment from an earlier one.

THIS case was tried on the 18th February, 1829, before Judge HOPKINSON and a special jury, who found a verdict for the United States, subject to the opinion of the court on the whole case. It was argued by INGERSOLL, District Attorney, for the United States, and by BRADFORD for the defendants.

On the 27th February, Judge HOPKINSON delivered the following opinion:

The facts, on which the question in this case arises, are these:

The United States obtained, in this court, two judgments against John Greiner on duty bonds; the first, on the 21st February, 1825, for five hundred and seventy-eight dollars, and fifty cents; the second, on the 2d May, 1825, for one thousand and ninety-two dollars and forty cents. The greater parts of these debts have been recovered; but a balance remains due. On the 1st February, 1826, the United States, issued a fieri facias on each judgment, which were levied on the property in question, being certain real estate in Race street, in the city of

Philadelphia; an inquisition was held and the property condemned under the executions. This is the foundation of the claim of the plaintiff.

On the other hand Stephen Girard obtained a judgment, since assigned to the defendant, against the same John Greiner, on the 27th October, 1819, in the Supreme Court of Pennsylvania. On the 23d October, 1820, a fieri facias was issued on this judgment, which was also levied on the same real estate in Race street. This levy, with a condemnation of the property, was returned to December term 1820, of the Supreme Court. Under this levy and condemnation a venditioni was taken out in May, 1826, and the property sold by it, on the 17th of that month.

On the 13th February, 1826, the insolvency of John Greiner was declared by a general assignment. The money received by the sheriff from the sale, was paid by him to the defendant, with the consent of the attorney of the United States, but without any waiver of their rights. The president of the Mechanics' Bank, on receiving the money from the sheriff, signed an agreement to which the United States do not appear to be a party, which recites the sale of the property, and the claim of the United States; "which claim is resisted by the Mechanics' Bank, and the point is to be adjusted by the court, out of which the venditioni issued, on a case to be stated." It is then agreed that "if the said court shall decide that the United States are entitled to be paid the amount of their claim out of said money, then the Mechanics' Bank agree to pay to the United States the amount of their said claim." No case ever was stated for the opinion of the Supreme Court of Pennsylvania, the court out of which the venditioni issued, nor does any movement appear by either of the parties to carry that part of the agreement into effect; but this suit was brought, in this court, by the United States, to try, in this way, the validity of their claim to the money in question. The declaration calls for money had and received for the plaintiff's use, for money lent and advanced, and on an account stated, and a verdict has been

rendered by consent for the plaintiffs, subject to the opinion of the court on the whole case.

The defendant raises two objections to the right of recovery. 1. That no assumpsit, express or implied, exists between these parties, to maintain the suit. 2. That the United States have no right to the money, either on the ground of the insolvency of John Greiner, nor by reason of any laches on the part of the Mechanics' Bank, in proceeding upon their judgment.

1. I am not inclined to sustain the first objection. Money paid by A. to B., to be by him paid to C., will support an action by C. against B. for money had and received to his use; although there was no promise, or direct privity, between C. and B. This is equitably and substantially our case. The money in question was locked up in the hands of the sheriff. By the consent of the United States, without which the defendant could not have received it, and which raises a consideration between them for the promise now asserted, it was paid by the sheriff to the defendant, not thereby changing the property, or the rights of the parties to it, but to be a deposit there, as it would have been in the hands of the sheriff, for the party who should finally be proved, judicially, to be entitled to it. It is true, in the receipt or agreement given to the sheriff by the Mechanics' Bank, the manner of obtaining a legal decision of the difference is mentioned; but it is not of the essence of the matter; it was never pursued by either of the parties; nor, as far as appears here, ever assented to by the United States.

It is said that the United States may have their remedy against the sheriff; but how can this be, when it is agreed here at the bar, by both parties, that the sheriff paid the money to the Mechanics' Bank, with the assent of the United States? This action has a very broad and equitable range; the money in question is admitted to be in the hands of the defendant; it is admitted that he received it under a promise to account for it to the United States, if it should prove to belong to them; the bank received it from the sheriff, knowing of the claim of the United States; knowing this they gave up none of their

rights to it, by consenting to its being transferred from the hands of the sheriff to theirs. I can therefore see no objection to their following their right and their property, into the hands, into which it has come under these circumstances.

2. The substantial matter of controversy between these parties is found in the second point. No claim is made by the United States, to be preferred to the defendant under the provisions of the act of congress, giving priority of payment to the United States, in certain cases. Indeed no such claim could have been supported. The Supreme Court of this state, has decided in the case of Wilcocks *v.* Waln, (10 Serg. & Raw. 380,) that "if the property of the debtor has been seized under a fieri facias, the property is divested out of the debtor, and cannot be made liable to the United States." This is in entire conformity with the decisions of the Supreme Court of the United States.

The only question then is whether the Mechanics' Bank have lost the preference, which the priority of their judgment would give them, by any laches, so as to let in the judgment of the United States before them. The effect of an execution, levied on real estate, to continue the lien of the judgment, under which it was issued, in full force and life, has several times been under the consideration of the Supreme Court of this state; and with direct reference to the act of assembly requiring a revival of judgment, by scire facias, every five years, to keep up the lien.

It has been uniformly held, that the taking out a fieri facias, levying it on the lands of the defendant, and condemning them by an inquest, all of which were done by the Mechanics' Bank without delay, and several years before the judgment of the United States, in this case, are sufficient without a scire facias to keep the judgment alive, and to preserve the lien on the real estate, thus proceeded against.

A short review of the cases will show this to be the established and unquestioned law of Pennsylvania. In the case of Young v. Taylor, (2 Binney, 228,) it was objected that the

judgment had not been revived within five years, according to the act of assembly, but it was held by the court, that the taking out a fieri facias, levying on the goods and lands of the defendant, and condemning the lands by an inquest, was notice tantamount to a scire facias under the act; and sufficient to preserve to the party the full lien and benefit of his judgment.

In the case of Cowden v. Brady, (8 Serg. & Raw. 505,) the contest was between one Haye, a creditor of Brady, who had a judgment in the county, where the land lay, and one Cowden, who had a prior judgment in another county, but had issued a testatum fieri facias to the county in which the land was situated, which testatum was not followed up by a sale, but "grossly neglected" for several years. The judgment of Cowden was in July, 1807; his testatum fieri facias issued to August term, 1809, and was levied, and the land condemned. It remained dormant from that time until 1813; and again from 1813 to 1816. The proceedings under this execution being returned to the court from which it issued, which was not in the county where the land lay, no notice of them was legally or actually given to any body. Haye's judgment was entered in March, 1811; it was regularly and promptly followed up, and the land in question was duly sold under it, by a venditioni returnable to March term 1814. The deed to the purchaser at this sale was acknowledged in June, 1814; and the purchaser took possession accordingly. More than two years after this sale, to wit, in April, 1816, the land was again sold by a venditioni under Cowden's judgment. Here the question of preference was, between a judgment in the county of the land, binding it with record notice to all the world; and a fieri facias on a judgment in another county, put into the hands of a sheriff, and there neglected for several years; indeed for two years after the vigilant creditor had sold the land, under regular process to a bona fide purchaser, whose rights and possession were invaded by an ejectment on a title derived from this second sale. In such a case the court could not hesitate to prefer the judgment of Haye; at the same time

recognising the doctrine, that with due notice of the judgment and levy, in the county where the land lies, the creditor may safely indulge his debtor, by a postponement of an actual sale of his land.

In the case of Pennock v. McKisson, (13 Serg. & Raw. 144,) Judge DUNCAN delivering the opinion of the court, says, "this is a question of immense importance. It is whether an execution returned 'levied on land,' falls within the provisions of the act limiting the time, during which judgments shall remain a lien on real estate." The judge examines, with great care the act of assembly, and the adjudged cases bearing on the point; and in conformity with them, and the received opinion and practice of the bar, decides, that a levy on particular lands, preserves the lien of the judgment; and that no scire facias is necessary to keep it alive. It cannot therefore be superseded by a subsequent judgment, or any proceedings under it, "unless such a length of time had elapsed as that, by analogy to the statute of limitations, a presumption of satisfaction wouldarise."

In the case of Dean v. Patton, (13 Serg. & Raw. 341,) Canan had two judgments against Clarke; one prior to Davidson's mortgage, the other subsequent to it; writs of fieri facias were issued under both judgments, and returned levied on personal estate. Canan and Clarke made an arrangement to apply the proceeds of the sale of the personal estate, not to pay Clarke's first judgment, but the last, in order that the proceeds of the real estate might be taken to satisfy his first judgment, and cut out the mortgage creditor; under such circumstances, the court would not allow Canan and Clarke thus to manage the matter between themselves, to the injury of Davidson. As Canan had levied the execution of his first judgment on the personal property of the debtor, he was not permitted to withdraw it, and take for it the proceeds of the land sold by the mortgagor. The principal point of this case has no bearing on that now before the court; nor is there any incidental observation made by the judges, that is not in conformity with the principles of the cases above cited.

No cases have been produced by the district attorney, impeaching or questioning the law as given above. He insists that a man should not be suffered, by issuing a fieri facias and levying it, and keeping it for ever, to hold all other creditors off. No such consequence will follow, as it never has been doubted in Pennsylvania, that a later judgment may go on to the sale of the land, without impediment from an earlier judgment; and although it was long unsettled, it has at last been adjudged, in the case of the Commonwealth v. Alexander, (14 Serg. & Raw. 257,) that a purchaser at sheriff's sale, under a judgment, does not take the land subject to a previous judgment, obtained against the former owner of the land, unless it was sold expressly, subject to such prior judgment. The land being thus sold, clear of the incumbrance of earlier judgments, will bring its full value; the proceeds are distributed according to the priority of the liens, and no wrong is done to any body.

I will add, that when a statute, in peremptory and unequivocal terms, requires a notice of a special description, given and prescribed by the statute, I should not be inclined to receive any substitute, because I might deem it equally good and effectual for the purposes of the statute. But the practice of admitting what are called tantamount notices, has obtained too firm a footing in the courts both of this country and England, to be now shaken without danger. I have long doubted whether, if these steps could be retraced, they would be again adopted. If they have accomplished the equity of particular cases, it has been at the expense of certainty in all; and perhaps not without some usurpation of legislative authority. There is, however, no instance, in which it may be better justified, than in the decisions of the courts of Pennsylvania, on the matter here in question.

It is my opinion, that the verdict rendered in this case for the plaintiffs, be set aside, and a judgment entered for the defendant.

THE UNITED STATES OF AMERICA

*v.*

VIOLET PRIMROSE ADMINISTRATRIX OF JOHN PRIMROSE DECEASED.

**In a suit of the United States, against the administratrix of a surety in a revenue bond, brought thirteen years after the breach, and twelve years after she had settled her administration account, without having had previous notice of the bond or forfeiture, she was held to be entitled to judgment, on pleading want of assets and fully administered.**

THIS case was submitted to the court on the pleadings. It was argued by INGERSOLL, District Attorney, for the United Sates, and A. RANDALL for the defendant.

On the 27th February, 1829, Judge HOPKINSON delivered the following opinion:

Suit was brought on a bond dated on the 19th April, 1815, executed by John Primrose, in his life time, as surety for one Daniel Simpson, with a special condition, according to an act of Congress, passed the 18th January, 1815, entitled "an act to provide additional revenues for defraying the expenses of government, and maintaining the public credit, by laying duties on various goods, wares and merchandise, manufactured within the United States." (2 Story's Laws, 1471.)

The declaration charges that the said Simpson did not conform to the requisitions of the said act of Congress, and the conditions of his said bond, and the breach is laid on the 1st of May, 1815.

On the 27th May, 1815, a few weeks after the execution of the said bond, Primrose died. His widow, the present defendant, administered to his effects, and immediately called, by a notice published in the papers of this city, on all persons having any claims on the estate, to present their accounts.

The administratrix then proceeded in regular course, to file

and settle her accounts in the register's office; which settlement, in August, 1816, was duly and finally confirmed in the Orphans' Court. By this settlement a balance appeared to be in her hands of two hundred and twenty-nine dollars, and ninety-one cents.

The debts due from the intestate far exceeding this sum, the administratrix, according to the law of Pennsylvania, applied to the Orphans' Court to appoint auditors to apportion and distribute this balance among the creditors, according to their respective rights

No further proceeding appears to have taken place on this application; for, in fact, the whole balance had previously, to wit, on the 29th July, 1816, been paid into the hands of William Delany, attorney at law, and acting for the creditors. According to his receipt the money was paid to them, "to be distributed according to the claims of the creditors, on the adjustment of the proportions." Mr. Delany has been dead several years, but several receipts have been found among his papers for sums paid to creditors, as their dividends of the estate.

Things remained in this situation until the 11th March, 1828, nearly thirteen years, when the present defendant received a note from the district attorney, claiming the penalty of the bond, to wit, three hundred dollars, which was followed by this suit, brought to May Sessions, 1828. This was the first knowledge the administratrix had of the existence of the bond.

The declaration recites the bond, and the condition, and alleges the breach in the same words. The defendant pleads "nil debet," which puts the alleged breach in issue; but it is now admitted that the bond was forfeited. She further pleads "want of assets, and fully administered before she received notice of the obligation mentioned in the declaration."

This exposition of the circumstances of the case, is sufficient to show that no devastavit has been committed; and the defendant is entitled to a judgment.

RECOMPENSE HAND, DANIEL HILDRETH, ENOCH ELDRIDGE, JOHN REEVE, ISAAC SMITH, WILLIAM CURGIE, FRANCIS ELBERTSON, HUMPHREY HUGHES ASSIGNEE OF SIMEON PALMER, JEREMIAH BENNETT, AARON BENNETT, ALBERT HUGHES, AND ENOCH WILLIS

*v.*

THE SCHOONER ELVIRA AND HER CARGO.

1. What a pilot does beyond the limits of his duty as such may be the foundation of a claim for salvage, but not such acts as are within them.
2. If property abandoned by the master and crew, be taken possession of by a set of salvors; a second set have no right to interfere with them and become participators in the salvage, unless it appears that the first would not have been able to effect the purpose without the aid of the others.
3. The amount of salvage to be allowed must be estimated by the compound consideration of the danger and importance of the service; the value of the property saved is an essential circumstance in estimating the latter.
4. A previous and contradictory statement of a witness may be given in evidence to impeach his credit, but not as proof of the facts formerly stated.

THIS case was argued by P. A. BROWNE for the libellants, and CHAUNCEY for owner and claimant.

On the 14th April, 1829, Judge HOPKINSON delivered the following opinion:

This is a claim of salvage by the owners and crew of the pilot boat Leo, for services rendered to the schooner Elvira, by which it is alleged she was relieved from great danger and distress, and brought safely into the port of Philadelphia. A correct and careful understanding of the facts of the case is peculiarly indispensable to a just decision of it, for every claim of this description turns on its own circumstances.

The argument of the counsel for the libellants has been mainly raised on the statement published in a paper of this city, and furnished by John Seabury, the second mate of the Elvira, which narrates the occurrences of the voyage in the usual animated and exaggerated style of such communications

made for the public, and not for the more accurate purposes of a judicial inquiry. I cannot receive this publication as any evidence of the facts stated in it.

John Seabury was examined as a witness on behalf of the respondent; what, therefore, he had said or published at another time, was properly admitted to impeach or test his credibility; and so far but no farther was it legal evidence. If a witness at another time has given an account of a transaction different from that given at the trial, he may be impeached by proving what he has said at another time, on the question of his credit; but you cannot substitute the other account in the place of that which you have discredited, making it thus the evidence of the cause. In this case, the difference is rather in the force of the expressions used, in the colouring of the description, in swelling exaggerations, than in matters of fact and essential importance. In a seaman's protest and reports the waves are always mountain high, the winds never less than a hurricane, and the peril of life generally impending. There may be some pride of authorship in these compositions, and the writer may aim to exhibit his power and skill in describing dangers.

I will take the facts as they have been given by the witnesses examined here; and there is no material variance between those on the one side and on the other, where they speak of the same transactions.

The Elvira sailed from St. Augustine, in Florida, on the 8th day of February last, loaded with live oak for the Navy Yard, at Norfolk, and bound for that port. She had on board the captain, the first mate, the second mate, two hands before the mast, two cabin passengers and seven steerage passengers who had been employed in cutting the live oak. From the 8th to the 21st February nothing occurred that was remarkable; but on the 21st the schooner was knocked down on her beam ends; about 8 o'clock in the morning they cut away the mainmast; the schooner righted and fell off before the wind. On the 22d they cut away the stauncheons and hove the deck load overboard, part of which had been previously washed off. On the

morning of the 23d, the foremast was carried away. They then rigged two jury masts and determined to put into the first port in the United States. They could manage the schooner with the jury masts pretty well; so that they could steer an eight point course.

From the 23d of February to the 13th of March, we have no regular or continued accounts of the occurrences that happened. It seems that the schooner had been blown off, and had been navigated as above stated. It is important to be here noticed, that the effect of the gale was confined to the destruction of her masts and rigging; her hull does not appear to have received any injury.

When she was knocked down on the 21st she took in about three feet of water; but after she righted and was got before the wind, she was cleared of this water by the pumps and leaked very little; about fifteen strokes in two hours, and this came through the deck. From the 21st of February to the 6th of March, the first mate says they were much fatigued, but after that they were better and thought themselves safe. On the 6th of March, a man was washed overboard, by their shipping a heavy sea, which did not hurt the vessel. On the 13th of March, they fell in with the schooner Milo, bound from Carolina to New York, and put on board of her the two cabin passengers and two of the steerage passengers, who, I think it was said, wanted to go there. From the Milo they received some bread and beef, being all the assistance they thought they wanted at that time. On the 14th of March they spoke a ship from round cape Horn, belonging to Nantucket, but required nothing from her. The mate says that between the 23d of February and 13th of March, they saw several vessels, but did not speak them.

During the period mentioned, it was blowing a considerable part of the time, and as an excuse for neglecting his log book, the mate says they had enough to do to keep the ship from going to the bottom. This was between the 23d of February and the 6th of March, after which, he says, they thought them-

selves safe. On the 17th of March at night, they made the lights on the Highlands, and, but for an unfortunate change of the wind, a few hours would have brought them to New York. But the wind came around to the westward; and the Elvira, unable to get to New York, bore away for cape Henry, her original destination. On the morning of the 19th they saw a schooner to the west of them, about six miles. At 11 o'clock the wind died away calm. In the afternoon about 2 o'clock, or, as Palmer the pilot says, about 4 o'clock, they saw a small schooner, in the westward, which they took to be a pilot boat, and proved to be the Leo. She was steering on the wind S. S. E., and the Elvira W. S. W. The pilot boat made one tack and fetched them, ran across their bow, launched a boat and came on board. There is no material difference, I may say, none of any kind, between the narrative of the mate and that of Palmer one of the pilots. Palmer says the weather was suspicious, that the sun was about crossing the line, and they generally look for a breeze. But the fact was that the weather was good, and so continued throughout their service. The situation of the Elvira at the time she fell in with the Leo was, that her masts and rigging were gone, but they had replaced them by jury masts and sails, under which she had navigated the ocean for three weeks; had been blown off the coast and returned to it; by the aid of which she would have safely entered the port of New York, but for a critical change of the wind; and with which she was at that moment making her way under a free sail to cape Henry, her place of destination. Whether she would have reached there we cannot positively say; but we have had no account of the wind or the weather to render it improbable. I confess that I am not without some doubt, whether, in such circumstances, the captain of the Elvira was justified in coming to Philadelphia at all, and whether it was not his duty to pursue his course to Norfolk. He thought otherwise and may have been right; at any rate he asked and accepted the service of the libellants to bring him to Philadelphia; and he is bound to pay for it.

What was that service in relation to those who offered it, and whose claim to be remunerated for it, is now to be decided? When the Leo saw the Elvira, the former was running with a free wind to her harbour within the capes of Delaware for the night. Jeremiah Bennett first discovered the schooner from the mast head. The Leo of her own accord, uncalled by any signal from the Elvira, not knowing of her distress, and perhaps supposing she wanted a pilot (for the Leo was a pilot boat, then actually cruising in her vocation) immediately brought towards the Elvira, making signals for her. These signals were answered by the Elvira, who was then between thirty and forty miles outside of the capes. When the Leo came up with the Elvira, she was under low sail: the longest mast was not above twenty feet long, and she had two masts with temporary sails. When the pilots got on board, the inquiry was not about any danger or distress on board the Elvira, but the usual salutation where are you from, and where bound? The answer was, from St. Augustine, East Florida, and bound to Norfolk. The pilot then asked the master of the Elvira, if he did not want to go into the capes of Delaware. The second mate, Seabury, says the pilots asked if they wanted the assistance of their boat. Palmer did not go on board the Elvira, and testifies nothing of this part of the transaction. A negotiation commenced for taking the Elvira into the Delaware, the pilots having declined to take her to New York, or cape Henry, as the captain desired; and a line is given from the Elvira to the Leo, and both vessels proceeded to the capes of Delaware, the Leo towing the Elvira, but assisted by her sails. The witnesses differ a few hours about the time they came to anchor, within the capes; but there is no dispute that the weather was good, the night light, and no difficulty, danger or fatigue in the navigation; Palmer says, "we towed the schooner along very easily." During the day of the 20th, the wind being unfavourable, they remained at their anchorage within the capes. They left there on the 21st, in the morning, and anchored about three miles below Reedy Island. They got under way

next morning about eight o'clock; and about two or three o'clock, of the same day, came to, a little below the Point House, that is, about three miles from this city, and were at the wharf in the evening. Both of the mates assert that the Elvira had on board, when the Leo came to her, fifteen days of provision of beef, bread, and water, although their allowance had been reduced.

Such are the leading facts of this case; and it is by them, that the claim of the libellants must be decided.

The first question is, whether the official character of the libellants, they being pilots of the bay and river Delaware, made it their duty to do all they have done for the relief of the Elvira; and whether under these circumstances they can present themselves before the court as salvors. I have no difficulty on this point; nor has it been insisted upon by the counsel of the respondent, although very fully argued for the libellants. The law makes the true discrimination. That which a pilot does in the ordinary course of his duty, can never be made the foundation of a claim for salvage; and the difficulty and exertion being more or less in such a case, can make no difference. He takes his chance for such hazards; he knows he must be exposed to them; and it must be presumed that his official compensation is calculated on the probability of such exposures. He cannot be at the same time, and in the same act, a pilot and a salvor. But he may become the latter, for services beyond the limits of the duty of the former. If when a pilot is put on board a vessel to bring her into port, a violent wind arises, and she is threatened with a casting upon the shore, assuredly it is the duty of the pilot to exert his utmost labour and skill to preserve her: and for so doing he could not set up a claim for compensation as a salvor. On the other hand, cases have occurred, and many may be imagined, in which the assistance rendered by a pilot is clearly beyond what could have been required of him by his official duty; and which, as Sir William Scott says, "may exalt a pilotage service into something of a salvage service." I consider this case to be one of that description;

and that the libellants are entitled to compensation for the assistance given to the Elvira, according to the circumstances of the case, and the principles of law applicable to it. Whether a seaman can, in any case, become a salvor for services rendered to his ship, in any extremity of danger or distress, is another question, upon which I do not now give any opinion. Great judges have differed about it, but it is clear that a seaman is much more closely bound to a ship than a pilot, and his duties to her are far more extensive, permanent and severe.

In deciding a case of this sort, where every thing is left to the discretion of the judge, I would not exercise that discretion arbitrarily, but hold it under the control of judicial principles and precedents. It is true it is difficult to find or force a rule, by which to measure the quantum of salvage. Circumstances vary so infinitely in the degree of danger; in the extent and risk of the service; in the value of the property; in the conduct and merit of the salvors, that a standard cannot be established to govern every case that occurs; nor even for classes of cases. There are nevertheless some general principles and precedents which have grown out of the experience of the courts, and afford strong lights to guide us in every new case.

I will as briefly as it may be done, take a review of the English and American adjudications upon this subject. This review will be somewhat tedious; but as many decisions of high authority have been given, since the subject has been agitated in this court, it may save us trouble in future, to look to them now.

The definition of salvage given by Abbott is clear, comprehensive and accurate. It is "the compensation that is to be made to persons, other than those connected with the ship, by whose assistance a ship or its loading may be saved from impending peril, or recovered from actual loss." A difficulty has seldom occurred in deciding whether any given case was or was not a case of salvage. The question has generally arisen upon the quantum to be allowed. Now whether it be a case of impending danger, or of actual loss, it seems to be

required that the property must be saved or recovered by the assistance for which this compensation is claimed. We may not perhaps be so rigorous as to say, that it must be absolutely certain, that the property was saved by the assistance of the salvors, but it should be reasonably probable, that this was the case; and that the ship or cargo was preserved from loss or damage by their labour, skill and exertions. If goods are abandoned by those whose duty it was to take care of them; or if those persons are unable to preserve and protect them, it may be correctly said they owed their preservation to those who came to their aid; but it is difficult to maintain this proposition, when the proper guardians of the property remain with it; and have both the ability and inclination to protect it from loss or damage. Therefore, if property abandoned by the master and crew be taken possession of by a set of salvors, a second set have no right to interfere with them and become participators of the salvage, unless it appears that the first would not have been able to effect their purpose without the aid of the others. The same principle must apply to a case, when the master and crew of the vessel are able to effect the purpose of preserving and bringing her safely in, without the aid of others. My main doubt throughout this case has been upon this point. I have not clearly seen the necessity of any interference on the part of these salvors. I have not been satisfied that the Elvira could not have made her proper port, or some other, in safety; that she might not have come into the Delaware without the assistance of the pilot boat; that she was "saved from an impending peril." A service may be convenient, beneficial, meritorious, and not necessarily, a salvage service. I will not, however, urge this objection upon the libellants. The master of the Elvira thought proper to accept the assistance offered to him; and the owner now is willing to pay what may be considered a just and reasonable compensation for it. No exception has been taken to it, on this account. The respondent has met the claim on liberal grounds. It may be that the master of the Elvira acted with a proper precaution,

and attention to the interests of her owner, in coming here to refit. A change of weather might have been apprehended at that season, which would have been dangerous to him; but in the actual state of things, when he put himself under the protection of the Leo, his danger was not pressing or apparent. The "impending peril" was not immediate, or perceptible. This schooner had previously met with several vessels; had asked no assistance from any of them, further than some small articles of provision and water; her master and crew had never intimated any apprehension of personal danger, nor any intention of seeking safety by leaving her. She was sound and tight in her hull, and with masts and sails, with which she could be pretty well managed. She had encountered and conquered much greater hardships and dangers than any that lay between her and her port; and the fair presumption is that she would have reached it.

We must inquire into the quantum of salvage that should be allowed in such a case, according to the principles and practice of admiralty courts in other cases.

The compensation, which may be justly allowed for this service, should be governed by a compound consideration of the importance of the service rendered, and the danger and labour to which the salvors were exposed in rendering it; and the importance of the service depends upon the value of the property saved, and the extent of the danger, which threatened it. With a view to public policy this allowance should be weighed in a liberal scale; but with a primary regard for the unfortunate sufferer, whose protection, relief, and interests are the true objects of policy.

It has frequently fallen to the lot of Sir William Scott, a most liberal admiralty judge, to estimate the value of salvage services, and we shall see the measure he has adopted in the case of The Aquila (1 Robinson, 37.) In that case the ship and cargo were found at sea, absolutely deserted by those, whose duty it was to protect them, and a total loss was certain unless prevented by strangers. The finders contended for a property

in the goods as their own; and not merely for a reward as salvors. This, and several other interesting questions, were discussed in the case, which are not to our present purpose. The rate of salvage is our inquiry, and in this most desperate case, in which the owners owed every dollar that was restored to them to the services of the salvors, Sir William Scott gave them but two fifths; or less than one half.

In the same volume, page 306, the case of The Joseph Harvey is reported. This was the petition of a pilot for salvage, in which it was decided that a pilot may render a service to a ship in distress, which will entitle him to be considered something of a salvor. The petitioner espied The Joseph Harvey under a signal of distress; the wind blowing hard; the waves running high. He went to her and got on board with great difficulty; this the judge thought gave no claim to any thing more than common pilotage. It is not, says he, for such reasons that pilots can be entitled as salvors; their occupation is hazardous from its nature.

In the case of The William Beckford (3 Robinson, 355), Sir William Scott says; "The principles, on which the court of admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look not merely to the exact *quantum* of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature. The fatigue, the anxiety, the determination to encounter danger, when necessary, the spirit of adventure, the skill and dexterity which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of the salvors most, is the actual danger which they have incurred."

I cannot forbear to observe, that not one of these elements of salvage, so eloquently described, is found in the case before us. Neither fatigue; nor anxiety; nor courage; nor spirit of adventure; nor skill and dexterity; nor the least actual danger. In the case of The William Beckford, the judge thought there was no peril of life, in the degree contended for by the salvor's

counsel; from which expression we must presume it did exist in some degree; but there was great alarm about the possibility of saving the ship after she got upon the sand. It was proposed to the master to throw the cargo overboard, and he acquiesced in it, and it was resisted by the salvors, who used their efforts and employed their skill, and the ship and cargo were finally saved. These exertions were continued through the third day, and the salvors were numerous. A circumstance always, and properly considered. The judge acting in so strong a case of labour, skill and service, and applying to it the liberal principles with which he prefaces his decree, gave to the salvors, less than one fourteenth part of the value of the property saved; that is something more than one thousand two hundred pounds, on seventeen thousand six hundred and four pounds.

In the case of The Trelawney, (4 Robinson, 223) The Lord Nelson a slave ship had recovered The Trelawney, another slave ship, on the coast of Africa from some insurgent slaves, who had dispossessed the master and crew and set them on shore. This was done after a severe conflict, with very desperate persons, in which some of the crew of the Lord Nelson were wounded. Without this adventurous effort, The Trelawney and her cargo would have been inevitably lost. The judge in deciding the case says, he will consider the value of the property and the service performed, which, he adds, "is to be considered as a rescue effected from pirates, and, to say the least of it, full as meritorious as recovering property out of the hands of a public enemy." On this view he would have given salvage in as high a proportion as directed by the prize act, for cases of recapture of war. But he remembers the nature of the trade, in which the two ships were employed; their common danger, and the policy and duty of rendering mutual assistance, and not as ships accidentally rendering such assistance—considerations having some bearing on the case before us. Under these circumstances the court allowed one tenth of the ship and cargo, both confessedly saved from total and inevitable loss.

In the case of The Blenden Hall (1 Dodson, 414) the vessel, loaded with naval stores, was separated from her convoy by tempestuous weather, by which she was greatly damaged in her hull and rigging; she was taken by a French frigate, her master and crew taken out, and the ship scuttled. She was found in this situation, by the packet Eliza, who put a number of her crew on board of her. Afterwards, being in great peril from stormy weather, and in great distress, she was relieved by The Challenge who put men on board of her, and she was brought to Plymouth. Sir William Scott gave one tenth of the value of the property saved to the salvors.

The case of The Raikes (1 Haggard, 246), was the first case of salvage service by a steamboat. Lord Stowell declares his inclination to encourage, as much as possible, similar exertions, on account of the great skill and power of vessels of this description. The ship saved was delivered from a perilous situation; there was great alacrity in rendering the assistance; the steamboat went out from Dover, being sent for on purpose to relieve The Raikes; she lay by her all night in the month of December, watching and attending her, and finally brought her safe in. The vessel and cargo were estimated at the value of twelve thousand five hundred pounds, and the judge meaning, for the reasons stated, to be exceedingly liberal, allowed the salvors two hundred pounds. The commissioners from whose award this was an appeal, had given but one hundred and fifty pounds.

These are the leading English cases, and fix a principle of liberality tempered by moderation, and a just regard to the rights of the owners of property exposed to marine hazards, that may be safely followed. The American decisions, on this subject, do not differ in their principles from those cited from abroad, although the allowances appear to be rather more liberal.

I shall refer to some of the best authority. An early and leading case in this district, is that of La Belle Creole. (1 Peters Ad. Dec. 31.) Judge Peters, who examined the question very carefully, says that the compensation is not to be a mere

*quantum meruerunt*, but an exemplary reward; comprehending a reward for the risk of life and property by the salvors; labour and danger; and even as a premium for similar exertions. He quotes the principle that "he, who has recovered the property of another from imminent danger, by great labour, or perhaps, at the hazard of his life, should be rewarded by him, who has been so materially benefitted by that labour." Thus an imminent danger, great labour, hazard of life, and material benefit, are the ingredients of a meritorious salvage. In page 41, the judge says, "that the maritime law has varied from twentieth to one half, according to the description and value of the articles saved, and the risk, labour and expense of salvage." In this case of The Belle Creole, the court allowed a salvage of one third. The circumstances were these. The libel stated that when the saving ship fell in with The Belle Creole, she was declared to be sinking; her master desired the salvors to remain by him; the weather was tempestuous; and the captain and crew, at their repeated solicitations, were taken on board of The Amiable. A proposition was made to burn The Creole. Her captain and crew declared when they left her, that they relinguished and abandoned her, and every thing on board of her; she was left without a living person on board; the next day the master and crew of The Amiable took from her a quantity of merchandise, and she was set on fire at the request of her master. The answer admitted, that she was in great distress, and in danger of perishing; and the leading facts stated in the libel, were established by the evidence. She had eleven feet of water in the hold, when the articles were taken out of her; and one half of her cargo had been thrown overboard, before she fell in with The Amiable. The judge speaks of her situation as distressed and hopeless.

In the same volume, page 48, is the case of The Cato. She was found by The Alexander "in great distress, and on the point of perishing." Her master, crew, and part of her cargo were taken out of her, and she was abandoned. A gross sum of one thousand five hundred dollars, was

allowed to the salvors, being about two fifths of the property saved.

The schooner Polly, (1 Gallison, 134,) with a cargo of flour, was dismasted at sea; continued nine days under jury masts, and was in a very distressed situation. She fell in with the Triton, on board of which her whole crew went; and which remained by her that day and the following night. Then another ship, the Reserve, came up, and the Triton being heavily laden, the captain and crew of the Polly went on board of the Reserve. The Triton left them; the Reserve took the Polly in tow for five or six days; and during that time took out the articles libelled, having been detained by this service a week on her voyage. Judge Story, affirming the decree of the District Court, allowed a salvage of one third. Observing that "by the stoppage, it seems to have been generally considered, that a deviation resulted, and of course that the ship was put at the hazard of the owner."

In the case of The Blaireau, (2 Cranch, 240,) two fifths were allowed by the Supreme Court of the United States, in a very hopeless case, recovered altogether by the salvors.

The case of The Cora, (2 Peters Ad. Dec. 361,) was a deplorable case of distress. She was deserted by her crew, with five feet of water in her hold; and brought into port by part of the crew of The Ceres with great difficulty; exposing The Ceres to great danger from the absence of so many of her hands. The men put on board The Cora were also exposed to much danger, during a storm. In such a case, one third of the gross amount of sales, was given to the salvors, by the District Court, and affirmed on appeal, by the Circuit Court.

The Maria, (2 Peters Ad. Dec. 424,) suffered in a storm "so long and so much, that she became a mere wreck, and no hope of safety was left." One third of the articles saved from her was allowed to the salvors. The Maria sunk and was lost.

With these precedents in our view, I will recur to the case of these libellants. I have already shown, that the "im-

pending peril," if any existed, was inconsiderable, uncertain, and distant; resting rather in apprehension than reality. The danger of the original disaster had gone by; "we thought ourselves safe," says the mate, and the conduct of all on board shows that they really did think so. Such being the condition of those to whom the assistance of the libellants was tendered and given; what is the amount of the merit of this assistance, in reference to the labour, skill, risk, and expense with which it was attended? When the libellants descried the Elvira, they were cruising in their ordinary vocation, looking out for employment; they were, it is true, without the prescribed limits of their pilotage ground, but they had gone there for their own pleasure or profit, and not in the service of the Elvira; at the moment they were steering for their harbour, within the capes, for the night. They return six or eight miles to the Elvira; and this was all the distance they went out of their way. They made fast a tow line; resumed their course to their harbour, and came to it, in fine weather, and with a favouring wind, a few hours later than they would have done, had they left the Elvira to her fate. So far they had endured neither labour, risk nor expense in this service. On account of a head wind they remain snug and safe in this harbour during the next day, which was the 20th of March; in the morning of the 21st, they make sail and proceed up the bay; and in the evening come to anchor about three miles below Reedy Island. The next morning, at about eight o'clock, they are under way again; and come to, above the Point House, that is, about three miles below the city, at between two and three o'clock, in the same afternoon; in a short time they are at the wharf in this city. All this was done without one moment of anxiety or danger; one effort of labour; and a very small expense. The sails of the Leo and the Elvira, acted upon by a favouring breeze, performed the whole duty, and for aught we know, the crews of both vessels reposed in total inactivity, during the whole passage. In coming within the capes, on the night of the 19th, the libellants only did what they would have done for their

own purpose and accommodation: and all they added to their labour in the service of the Elvira, was the passage from thence to Philadelphia, and the towing of her into the capes. The Elvira appears to me to have been so entirely able to get up to the city of herself, that I am inclined to believe, the Leo accompanied her, not because her aid was necessary, but to look after her reward. When we consider the rate, at which these vessels came up the bay and river, sailing from their anchorage, a few miles below Reedy Island, to Gloucester Point, a distance of fifty-five miles, in about seven hours, it is clear the Elvira did not hang very heavily on her conductor, but must have been greatly aided by her own sails in her progress. I must repeat, that it can hardly be doubted, that she could have come up of herself; that after she got within the capes, she was no longer in any danger; and that the necessary, indeed the useful service, she received from the Leo, ended on their anchoring in their harbour, on the first night. It will be recollected, that she there got a new anchor from the shore, and her danger at least was at an end.

In assessing the compensation, which should be paid to these libellants, we must not overlook the great loss irretrievably sustained by the owner of the Elvira and her cargo, by this disaster. Her masts, sails, and rigging entirely demolished; her anchor and chain cable lost; her load thrown or swept overboard; and a voyage protracted for six weeks, that might have been performed in as many days. It is perhaps not too much to say, that half of his property has been sunk in this misfortune. It would be cruel and unjust to aggravate so much suffering, by an extravagant charge for such inconsiderable services. We must not teach a salvor, that he may stand ready to devour what the ocean may spare; he must not be permitted to believe, that he brings in a prize of war, and not a friend in distress. If he has afforded his assistance to the distressed in a proper spirit, he will be satisfied with a just and fair remuneration for the labour, hazard, and expense he has encountered in the service; and it is only a proper spirit that we should seek or desire to

satisfy. To this measure of compensation the judge, governed by a liberal policy, will add a reasonable encouragement, which the generous and humane will hardly need, to prompt men to exertions to relieve their fellow men in danger and distress. But we must remember that the policy of the law is not to provoke or satisfy the appetite of avarice; but to hold an inducement, to such as require it, to make extraordinary efforts to save those, who may be encompassed with perils beyond their own strength to subdue. In the present case we can hardly say, that any extraordinary effort was made; to take a tow line for a disabled vessel, is one of the most ordinary acts of courtesy among seafaring men.

I know of no probable or plausible calculation, on which I can suppose that this pilot boat, and those on board of her, could have earned half the amount tendered by the respondent, while engaged with the Elvira, and certainly they could not have earned it, with less labour, risk and expense.

I decree that the sum of three hundred dollars, which is above one ninth of the value of the property saved, be paid, clear of costs to the libellants for their services rendered to the schooner Elvira, and her cargo. If in fixing this amount of salvage, I have been influenced by the sum offered by the respondent, I can assure the libellants that that influence has been altogether favourable to them.

I make no order of distribution among the salvors, as their counsel has informed the court, they have arranged, or will arrange, this matter among themselves.

SAMUEL ADAMS, ASA COMBS, KENNEDY ANDREWS, JAMES HOWARD, EDWARD GILLESPIER, JOHN ANTONIO, AND WILLIAM MARTIN

*v.*

THE BRIG SOPHIA, CHARLES A. KALBERG, MASTER.

1. When the cargo and freight of a vessel are lost, before the termination of a voyage, the wages of the seamen are also lost, and the original contract therefor is annulled.
2. When a portion of a vessel or her cargo is saved by the meritorious and extraordinary exertions of the seamen, a new lien arises thereon for their wages, although the freight is lost, and the original contract annulled.

ON the 6th April, 1829, this case was argued by J. R. INGERSOLL for the libellants, and D. P. BROWN for the respondent.

On the 25th April, Judge HOPKINSON delivered the following opinion:

Two libels are filed in this case; one on behalf of Samuel Adams, the mate of the brig; and the other on behalf of Asa Combs and others, seamen; both claiming wages for the libellants as mariners on board of the brig, on her late voyage from St. Thomas to Rum Key, and from thence to Philadelphia. This vessel sailed from St. Thomas on the 19th November last, arrived safely at Rum Key, and, after some detention there, proceeded on her voyage to Philadelphia; but on the 4th of February was wrecked near the capes of Delaware. The vessel and cargo were lost; but some of the rigging and spars were saved, and brought within this district, and have been libelled and attached to answer the claims of the libellants. The seamen have set forth their claims in their libel; and the mate has preferred his separately. They present different questions for the consideration and decision of the court, and will be separately examined. I shall first take up that of the seamen.

It is objected to these libellants, *in limine*, that their libel presents no case for them; that, taking the facts, they state to be true, they do not show a right of recovery; or rather that it is apparent, on their own statement, that they are not entitled to the prayer of their petition; that is, to their wages on the voyage described.

The proceedings of a court of admiralty are not rigidly bound in the trammels of form; but, in every court, there must be some rules adhered to in the administration of the law, without which it would be a chaos of uncertainty and confusion. One of the most obvious and indispensable of these is, that the plaintiff shall exhibit such a case to the court, as entitles him, if true, to the judgment of the court. This can hardly be called matter of form; it is rather the substance on which the subsequent proceedings are to rest. How can a defendant answer a plaintiff who alleges nothing which charges him with any liability? Why shall he admit, or deny, or disprove a narration of facts, which when admitted or proved gives no cause of action against him; and which therefore need not be denied? Whatever case a libellant may have on his evidence, or in the truth of the transaction, he must also present a good one in his libel of complaint, and in his petition for redress, otherwise, should the relief asked be granted, the record of the court will not justify its decree; a plaintiff will obtain a judgment showing no right to it; and a defendant fall under the condemnation of the law, who has done no wrong. If such proceedings are taken, for revision, to a higher tribunal, which would have only the record for its guide and knowledge of the case, and could know nothing of the evidence, what could be done, but to reverse a decree to which the party shows he has no title?

These principles cannot be questioned; they are supported by common sense, as well as by the authority of legal adjudications. We must test by them the libel of Asa Combs and others, with a disposition to support it, if it can be done without injury to more important matters.

The libel sets forth, that the libellants, on the 20th November, 1828, at the port of St. Thomas, shipped on board the brig Sophia, as mariners, to perform a voyage from the said port of St. Thomas to Rum Key, and thence to Philadelphia; and thence back to St. Thomas, for certain wages. They further state, that they proceeded on said voyage, and continued doing their duty faithfully on board of said brig, until she was lost, without any fault of the petitioners, near cape Henlopen in the state of Delaware. They then state the amount of wages claimed, and pray that they may obtain relief in the premises, and such decree against the proceeds of the tackle, apparel and furniture, and other avails of the said brig within the jurisdiction of this court, as the court shall deem requisite.

In this libel we have an averment that the voyage, for which the wages are claimed, began at St. Thomas; that it was thence to proceed to Rum Key; thence to Philadelphia, and back to St. Thomas; and that before the arrival of the brig at Philadelphia, she, together with her cargo and freight, was lost. On such a case, what is the sentence of the law? Clearly and undeniably that the wages of the seamen are lost with the freight, which is said to be the mother of those wages. This is the general, undisputed rule of the law. There is, however, an exception to this rule, founded on an obvious and just commercial policy. It is this; that when any part of the vessel or cargo is saved by the meritorious exertions of the crew, in the hour of distress and peril, they shall receive their wages out of the property thus preserved. On this principle a new claim for wages is given by the law, although that which was founded on the original contract between the ship owners and the mariners, is annulled and lost by the loss of the freight. The claim therefore presented to the court, in such a case, must lay its foundation on the facts which give it birth and existence, and by which only it can be sustained; and not on a contract which is utterly defunct and extinguished. The mariner cannot come here and say; I demand the payment of my wages by virtue of my shipping contract, and, at the

same time, set forth a fact or state of things, which has destroyed and avoided that contract and every right and claim under it. He should raise and assert his new claim on the allegation of the facts, by which it is created and supported; to wit, that notwithstanding the freight of the vessel has been lost, yet that, by his exertions and services a part of the property has been saved, for which and from which he asks his reward. It should be observed, that to entitle the seaman to a resuscitation of his lost wages, two circumstances must concur, to wit, the saving of the property, which is the fund to which he is to look for payment; and that its preservation was owing to his services and exertions. The libel before us makes no allegation of either of these circumstances, but places the claim of the libellants on their original shipping contract, and their having faithfully performed their duty "until the brig was lost." But the duty and service, for which only they can maintain their claim, should have been performed after that unfortunate event, in rescuing the rigging and spars from the wreck. So as to the saving of this property; it is not directly alleged that any thing was saved, but it is merely incidentally alluded to in the prayer of the petition, by which the payment of wages is asked for, from the proceeds of the tackle, apparel and furniture of the brig. This is not such an averment or allegation as the defendant could have denied or taken issue upon. If, however, this were to be taken as a sufficient allegation of the preservation of a part of the property, where is it said or intimated that it was preserved by the meritorious exertions and services of the libellants? To say that they faithfully performed their duty until the vessel was lost, is far from presenting the ground, either directly or by necessary inference, on which alone this claim can be supported.

I wish to have it understood, that, in this case, the libel expressly states the loss of the vessel on her voyage; and then does not go on to aver or set out the facts, by virtue of which wages become due, and may be recovered notwithstanding such loss. The case would have had a different shape, if the libel

had preferred a general demand of wages, earned on that voyage, in the usual form, omitting every thing of the accident to the brig. In such a case the defendant would have opposed the demand, by answering that the vessel, cargo, and freight were lost before the termination of the voyage by shipwreck. This course of pleading would have brought the whole matter into the view of the court on the allegations and testimony of the parties. I mention this because I do not deem it to be indispensable, that in case of wreck, the libellants should set out the salvage and their services; although it is the usual and certainly the best manner of bringing up the case; but that where a seaman does state the wreck of the vessel in his libel, he must go on to set out such circumstances, as will, notwithstanding this loss, entitle him to his wages. In other words he must not show a case, on which he is not entitled to the relief he prays for; he must not demand his wages on his original contract while he shows that such contract is destroyed, and can give him no right of recovery.

It is my opinion that these libellants cannot have the judgment of this court on the case they have presented; and this libel must be dismissed. I regret to send a party out of court on any thing but the clear merits of the case; and I have not been wanting in my endeavours to avoid it here. Whether, on the settlement of the accounts of these men, any thing would be due to them, it is unnecessary now to inquire; so also as to the charges made against them for neglect and misconduct.

I proceed to the case of Samuel Adams, the mate of the brig Sophia, in this disastrous voyage. His libel sets out the contract for wages, for the voyage; and alleges, generally, the faithful performance of his duty. He proceeds; "and your libellant further showeth that the said brig, on her passage to the said port of Philadelphia, was cast away in the night time near cape Henlopen, in the state of Delaware, and that without any fault or negligence whatsoever of your libellant; and your libellant further showeth, that nearly every thing belonging to the vessel was saved and preserved, and her tackle, apparel

and furniture brought within the jurisdiction of this honourable court through the exertions of your libellant." Here then is exhibited to the court a full and complete legal right to wages, if the allegations of the libellant are supported by the testimony. How has it happened that, in these libels, filed by the same counsel, on the same facts, there has occurred the difference, that exists between this for the mate, and that presented for the crew of the brig? It is the more unaccountable, too, as the libel for the mate was amended by some suggestions from the court, to prevent difficulties and exceptions to its form; and was filed with the clerk, two or three weeks before that of the men. Why the same form was not pursued; why so essential a departure from it was made, it is impossible for me to say.

To defeat the claim of the mate, some attempts have been made to show great negligence of duty in the course of the voyage; and, what is more important, that the very disaster by which all was lost, was owing to his culpable inattention in not casting the lead, when it was his watch on deck, and they were known to be on the coast. The mate assuredly does not stand before the court as a very vigilant or meritorious officer. He has no strong claims to consideration and reward out of the savings of this wreck. He has exhibited no extraordinary exertions or skill in the work of preservation, to reward which the law revokes its doom upon his contract for wages. But, on the other hand, the situation of the property did not call for extraordinary skill and daring; and he does not seem to have been wanting in any thing that was required of him by the captain, or by the emergency. The charges against him of gross neglect, antecedent to the loss of the brig, are not sufficiently sustained by the proof. I shall therefore decree that Samuel Adams be paid, out of the property attached by the process of this court, or its proceeds, the wages due to him at the time of the wreck.

Decree. That Samuel Adams, Mate, recover his wages out of the property saved, or its proceeds from the 19th No-

vember 1828, to the 4th February 1829, the time of the loss of the vessel, deducting sixteen dollars and seventy-five cents paid to him; and that the libel of ASA COMBS and the other libellants be dismissed.

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THOMAS A. WOOD, JOHN RIGGINS, JOSEPH HUSSEY, AND JOHN MONK

*v.*

THE BRIGANTINE NIMROD, NEAL, MASTER.

1. Where shipping articles authorise the master to touch at certain intermediate ports, "or as he may direct," it is no violation of his contract with the seamen to stop at a place not named, and affords no justification to them for leaving the vessel.
2. To justify the forfeiture of a seaman's wages for absence, under the provisions of the act of 20th July 1790, it is indispensable that there be an entry in the log book of the fact, of the name of the seaman, and of his having gone without leave.
3. Where a seaman is appointed to act as mate of a vessel, by the master, during the voyage, he may be removed by the master for incompetency, and is not entitled to any other wages than those originally contracted for.
4. Where a seaman is imprisoned for misbehaviour, he does not forfeit the wages accruing during his confinement.

ON the 2d May, 1829, Judge HOPKINSON delivered the following opinion in this case:

The libellants, Wood and Riggins, in this case, shipped on the 5th October last, at New York, on board the brig Nimrod, to perform a voyage, as mariners, from the said port of New York to Darien; thence to St. Thomas; thence to New Orleans, or as the master might direct; and back to New York, her port of discharge, at the wages of ten dollars per month. The brig sailed from New York, proceeded to Darien, went from thence to St. Thomas, thence to Maricaibo, and from Maricaibo sailed for Philadelphia, not going at all to New Orleans,

and arrived at this port on the 5th April, 1829. The brig at Maricaibo took in a cargo for Philadelphia, intending, as the mate swears, to proceed to New York after landing that cargo.

On the arrival of the vessel at this port the libellants left her, alleging that their contract was broken by the master by bringing the brig here. They have now sued for the wages up to the 5th April, the time of their arrival here.

On the part of the owners of the brig this claim is resisted, on the ground that the libellants, by deserting the vessel before the termination of the voyage, have severally forfeited their wages. Whether this contract was broken and terminated, or not, by coming to Philadelphia, depends upon the meaning and construction of the shipping articles. The voyage of the contract is there described to be from New York to Darien, thence to St. Thomas, and thence to New Orleans, or "as the master may direct," and back to New York. The brig went from St. Thomas to Maricaibo, omitted New Orleans altogether, and sailed from Maricaibo for Philadelphia with a cargo, intending afterwards to proceed on to New York. The libellants contend that the captain, having substituted Maricaibo for New Orleans, was then bound to return directly to New York, and that his coming to Philadelphia was a violation of the contract, which discharged them from their obligations under it. The phrase is not to New Orleans, 'and' as the master may direct, but 'or;' it was not therefore compulsory on the master to go to New Orleans; and he did not. But was he restricted to one other port in the place of New Orleans, if he should not choose to go there? The contract does not say so. At St. Thomas the future prosecution of the voyage is left, under just and reasonable limitations, much to the discretion of the master; and there probably was good reason for doing so. We must give the terms of the contract their natural and obvious meaning, neither restraining them unreasonably, nor taking a latitude oppressive and unjust. At St. Thomas this brig is to be under the direction of the master; the libellants are to go with her to New Orleans, or "as the master may direct" them to go; and not to such

other port as he shall direct. The terms are as broad as if it had been "or elsewhere." Under a phrase so broad, how can the libellants claim to limit the power given by it to the going to Maricaibo? Under the decisions that have been made on the meaning of "elsewhere," we will take care that these general expressions shall not have a construction obviously extravagant, unjust and impolitic, as was attempted in some of the cases that may be cited. Surely the respondent in this case does not ask for any such latitude, or unreasonable use of the liberty given to him in the contract. It is agreed that he might go to some other place than New Orleans; and there is no complaint of the substitution of Maricaibo. What further has been done by the master, under his power to proceed from St. Thomas as he might choose to direct? From Maricaibo, instead of sailing directly for New York, he stopped at Philadelphia to discharge a cargo taken in for that port; this would have been done in a few days, and the brig would have pursued her course to New York, if it had not been prevented by the desertion of the libellants. Is this such an unreasonable and oppressive use of the liberty given to the master, by the contract, as will justify these men in abandoning their duty, and leaving the vessel and her cargo to their fate; thereby preventing the very thing they affected so much to desire, that is, to be taken to New York, the place at which they shipped, and to which they were to return? I cannot but consider this as a mere pretext. They did not leave the vessel because she came to Philadelphia, and they wished to go to New York; but for some other reason and object not disclosed. This imputation upon their motives is much strengthened by the circumstance, that at Maricaibo they knew a cargo was taken in for Philadelphia, and that the brig was coming here: and no hint or objection was made to it by any of them. That was the time to speak if they thought the contract was violated; but they acquiesced; they came willingly here; and as New York was expressly stated to be the termination of the voyage, they could not have supposed the master intended to substitute Philadelphia for it; for indeed he had no right to do so.

I have no hesitation in saying that there has been no violation on the part of the master, in coming to Philadelphia; and of consequence, that it affords no justification to the libellants for leaving the brig.

The next question is, as to the consequences of this misconduct on their claim for wages. Are they forfeited? While courts of admiralty are vigilant to correct and punish the irregularities of seamen; and to keep them under subordination to the law, and to their contracts, they avoid, as far as they can, to visit them with the extreme penalty of a forfeiture of all their earnings. They are a strange race of men, and indulgence is given to the habits contracted by an irregular and changing life. Certain it is, that when this forfeiture is demanded, it must be shown to be strictly due. The statute, under which it is claimed, is highly penal: and the terms, upon which it is awarded, must be rigorously pursued. Has this been done in the case before the court?

By the fifth section of the act of Congress, of 20th July 1790, it is enacted, that if a seaman shall absent himself from the ship without leave of the master, and the mate, or person having charge of the log book "shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself," &c. On this statute it has been decided and settled, that the entry in the log book is indispensable to prove the absence or desertion of a seaman; that the entry must distinctly state whether the absence was with or without leave; stating that he left the ship is not sufficient. The act, too, expressly requires that the name of the absenting seaman shall be entered in the log book; and where a seaman whose name was Malone, was entered as Miller, Judge Peters doubted its sufficiency, although there was no doubt he was intended, and it was proved he had gone by different names. In this case the entries begin on the 5th April and are continued to the 13th, sometimes stating that "the people went ashore" and sometimes "the people still absent;" but in no instance giving the name of any one of them, or saying whether

they were absent with or without leave. There can then be no forfeiture of wages in this case, and it need not be regretted, because, although these men left this vessel in a disorderly and improper manner, there seems to have been no disappointment to the owners, in not getting the brig on to New York; indeed from the prompt manner in which they advertised her for freight from this port, in three days after her arrival, one might presume they made the change without much reluctance and probably without any loss or inconvenience.

What wages are to be paid?

To Hussey and Monk from their shipment at St. Thomas to their arrival at Philadelphia, at the rate specified in the articles; deducting of course, whatever sums they are legally chargeable with, as payments or otherwise, which, I understand, will be arranged by the counsel.

The claims of Wood and Riggins, are somewhat different. They shipped at New York at wages of ten dollars a month, and severally demand an increase of compensation for reasons they respectively urge.

1. As to Wood. It seems that on the arrival of the brig at Darien, the person, who had been shipped as mate, was turned off for gross misconduct, and the captain was compelled to endeavour to supply his place from the crew. This choice fell on Wood, who was announced by the captain as mate of the vessel, at the wages of twenty-five dollars per month. He continued in his new office about two weeks, when he was removed from it, and returned to his first position before the mast, where he remained doing duty as a seaman for the remainder of the voyage. The reason given for this degradation was, that he was found to be wholly incompetent to perform the duties of the station; that he was repeatedly drunk, and in other respects grossly misbehaved himself; all of which is testified by Marcus Nelson. Wood, pretending, but by no means proving, that he was degraded unjustly and without cause, insists upon holding the master to his second contract, by which he became mate of the brig, and entitled to twenty-five dollars per month.

Setting aside at present, the cause of his degradation, I am inclined to think that these temporary appointments, made by the master of a vessel on an emergency, are held at his pleasure; they must necessarily be mere experiments of the success of which he is to judge. Assuredly such an appointment stands on a very different footing from that of mate, originally shipping as such; making his contract for the office, and for the wages belonging to it. In such a case Judge Peters says, (1 Peters Ad. Dec. 247.) "The mate is a respectable officer in the ship, and generally chosen with the consent of the owners; he is under the orders of the master in his ordinary duty; but his contract is not subject to arbitrary control." Even, however, in that case, a mate may be displaced by the master for good causes, to be judged of by the court, which should "be evident, strong and legally important." In Wood's case there can be no question of the right of the master to return him to his first situation in the ship; under the circumstances of an attempt to elevate him, which his own incapacity and misconduct defeated. His pretension for mate's wages from the time of his appointment to the end of the voyage, is altogether untenable, and must be dismissed.

I have no better opinion of his claim for mate's wages during the short period he nominally acted in that capacity. I say nominally, for he does not appear actually to have done any thing, he might not, and ought not to have done, as an ordinary seaman. He did not keep the log book; and he could not, being deficient in an important requisite; he could not write. For the same reason he did not and could not take an account of the cargo discharged or taken in. In short the experiment of making a mate of this man totally failed; which, added to his gross misconduct, by drinking and negligence, puts him justly back to his first contract as a common seaman on board the brig, and the wages thereby due to him; and no more. His account must be settled on these principles.

2. Riggins also shipped for ten dollars a month; he claims twelve dollars from a certain period of the voyage. He is

not entitled to it. The promise of this increase was made on conditions of good conduct and additional services he never performed. On the contrary, his misbehaviour was so extreme as to make it necessary to imprison him at Darien. He must have his wages at the rate of ten dollars a month. At the same time he must not be charged with the sum paid for a hand in his place, while he was in prison. Judge Peters truly observes, this would be a double punishment for the same offence; a punishment by confinement, and also by a forfeiture of wages; for charging him with the wages of the substitute is the same in effect as forfeiting so much of his own.

Decree. The claim of Thomas A. Wood for mate's wages for part of the voyage is dismissed, and he is to be allowed wages only as an ordinary seaman according to the articles; the claims of Hussey and the other libellants to be settled on the same principles.

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William Brown and James Bowles

*v.*

The Brig Neptune, Robert Madagan, Master.

1. Where a vessel is detained in port by the wrongful absence of a seaman, a deduction from his wages is allowed, to the amount of loss actually sustained.
2. A seaman is chargeable for the value of articles lost by his inattention and carelessness; and the amount may be deducted from his wages.

On the 30th April, 1829, this case was argued by Grinnell, for the libellants, and Stroud for the respondent.

On the 2d May, Judge Hopkinson delivered the following opinion:

The difficulty in this case is to obtain a full and correct knowledge of the facts brought in issue between the parties. It is argued by the libellants' counsel, that if the owners of the brig have suffered any loss or damage by their negligence or misconduct, it is a fair ground of deduction, *pro tanto*, from their wages.

The respondent alleged, by way of set off, or deduction from Brown's claim, that the vessel was detained for four days, at New Orleans, waiting for this man, who was on shore without leave. It is proved he was ashore from the afternoon of Friday until about two o'clock on the following Monday; but we are quite in the dark as to the cause or object of his being there. Part of the time he was in prison, put there by the captain, probably because he would not come on board; but this is not distinctly known. Our information upon these points is very imperfect and unsatisfactory. The presumption, however, is that the man was in the wrong, for after a hearing before the judge, he was ordered to return to the vessel and his duty, and he did so.

Upon the whole evidence, it seems to be true that the brig was detained at New Orleans, after she was ready for sea, by the absence of Brown, and the pursuit of him by the captain. The question then is, how long was she detained on this account? This must not be measured by the whole period of his absence, but by the time she was actually prevented from sailing by that absence. He returned to the brig on Monday afternoon, about two o'clock, but she did not sail until Tuesday at four o'clock, waiting, as the witness says, for a pilot. This is not chargeable to Brown. Again, he left the brig on Friday, but the pilot did not come on board before Sunday; and, as the captain was not acquainted with the river, he could not have sailed without his pilot. This delay is not imputable to Brown. The delay from Sunday to Monday seems to be chargeable to his absence, and no more.

No evidence has been given of any direct loss to the owners, by this detention of the brig, other than the ordinary expenses

of such a vessel, which are rated at fifteen or twenty dollars a day.

It is ordered, that fifteen dollars be charged to the libellant, William Brown, on account of his absence from the brig at New Orleans, by reason of which she was there detained, after she was ready for sea; and that this sum be deducted from the balance appearing to be due to him, by the account annexed to his libel. That account must be further corrected, by commencing the time of service on the 7th November, instead of the 29th October, 1828. As to the injury done to the boat in putting a passenger on board of a steamboat, it does not appear by whose fault or negligence the accident happened; it may have been on the part of the steamboat, and it may have occurred without any culpable negligence in any body. No charge against Brown is allowed on this account.

James Bowles, the other libellant, seems to be properly chargeable with the molasses, valued at five dollars, lost by his inattention and carelessness. Let that amount be deducted from his account. We have no such evidence of the manner in which the copper was lost, as will warrant us in saying it was by such misconduct or negligence of Bowles, as to render him liable for it. We do not in fact know how it was lost.

Decree. That fifteen dollars be charged to the libellant, Brown, on account of his absence from the brig at New Orleans, to be deducted from the balance appearing to be due to him by the account annexed to the libel, and that account to be further corrected, by commencing the time of service on the 7th November, instead of the 29th October, 1828. That the libellant, Bowles, be charged with the molasses, valued at five dollars, and lost by his inattention and carelessness.

## DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

MAY SESSIONS, 1829.

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THE UNITED STATES OF AMERICA

*v.*

FRANCIS S. BEATTIE.

1. Where one of two sureties in a joint and several bond given to the United States, is sued separately, a discharge of the other surety, by the President under the provisions of the act of 3d March, 1817, cannot be given in evidence under a plea of payment.
2. The act of 3d March, 1817, merely releases the person of a debtor, but does not affect the debt.
3. The letters and transactions between the officers of the government and a debtor to the United States, relative to his account, may be given in evidence under a plea of payment.
4. Where an officer, receiving a salary from the United States, is surety for a defaulter, the continuance of the payment of his salary is no relinquishment of the claim against him as surety.
5. The settlement and closing of an account of a public officer does not discharge his liability as a surety for another officer, though the default of the latter was previously known.

ON the 18th August, 1818, Thomas Burrowes, a purser in the navy, as principal, and Francis S. Beattie and Edward M'Gee as sureties, executed to the United States of America a joint and several bond for twenty-five thousand dollars. The condition was that "Thomas Burrowes should regularly account, when thereunto required, for all public moneys received by him, from time to time, and for all public property committed to his care, with such officers of the government as should be

authorised to settle his account, and should pay over any sums found due on such settlement, and should faithfully discharge the trust." By an indorsement on the back of the bond, the secretary of the navy, acting in behalf of the United States, agreed "that the obligors were not to be held responsible for any loss of the said moneys or property, occasioned by capture, sinking, stranding, or any other unavoidable casualty; and, if the purser should be deprived of his books or vouchers by such circumstance, the obligors were to be exonerated, on producing satisfactory evidence of the facts, unless it was shown that the money or public property had been misapplied."

In the year 1821, Thomas Burrowes died, and on the 5th October, 1822, the fourth auditor directed the purser at Philadelphia to retain the pay of the defendant, Francis S. Beattie, who was a surgeon's mate, to meet a delinquency in the accounts of the former. This was done accordingly; and the suspension continued until the 30th June, 1823, when the defendant received a letter from the secretary of the navy, informing him that his accounts were closed, and that he was thereafter regularly to receive his pay and rations as a surgeon's mate. By this settlement, a balance appeared to be due to the defendant of two hundred and sixty-six dollars and eighty-seven cents, which was retained by the treasury, to be applied as an offset to the amount for which he was responsible as the surety of Thomas Burrowes.

On the 29th November, 1823, a final settlement was made at the treasury of the account of Thomas Burrowes, by which it appeared that, at the time of his death, there was a balance of public money due by him to the United States, amounting to one thousand two hundred and ninety-six dollars and twelve cents. To recover this, separate suits were instituted in the Eastern District of Pennsylvania, on the 19th January, 1824, against each of the sureties, Francis S. Beattie and Edward M'Gee. The summons in the former case was returned 'nil habet;' but judgment was recovered against the latter for the whole amount of the balance due from Thomas Burrowes. On

this judgment, execution issued against M'Gee, who was arrested and imprisoned, but, on the 16th August, 1824, the marshal returned that he had been "discharged by order of the president."

On the 7th March, 1825, the present suit was brought against Francis S. Beattie, on the same bond, and to recover the whole of the balance due from Thomas Burrowes, as above stated. The defendant pleaded "nil debet and payment, with leave to give the special matter in evidence," and the United States joined issue.

On the 10th June, 1829, the case came on for trial before Judge HOPKINSON and a special jury. It was argued by DALLAS, District Attorney, for the United States, and SYKES and J. C. BIDDLE for thedefendant.

The validity of the bond, and the correctness of the account of Thomas Burrowes, as settled at the treasury, being admitted by the defendant, and the set off, to the amount of two hundred and sixty-six dollars and eighty-seven cents, retained from his pay, being agreed to on the part of the United States, the only questions in the case arose upon the following evidence, offered by the defendant under his plea of payment, with leave. 1. The record of the proceedings against Edward M'Gee, a party to the bond on which this suit was brought, and of his arrest, imprisonment and discharge, by order of the President. 2. The letters of the fourth auditor and of the secretary of the navy; the first directing the pay of the defendant to be retained, on account of his liability, under the same bond; and the second, informing him that his account was closed, and his pay was to be resumed.

DALLAS for the United States.

All this evidence is objectionable; both that which relates to the suit against the co-obligor Edward M'Gee, and that which relates to the closing of the defendant's own account in 1823.

1. The record of the proceedings against Edward M'Gee is entirely irrelevant; there is no issue to which it can apply; the defendant is separately sued on his separate obligation, to which it does not even appear, by the record, that Edward

M'Gee was a party; to this suit he does not plead any release of a co-obligor, or of himself, but merely the general issue and a payment by himself. Is this record evidence to establish either one or the other? It is not; and were it now before the jury, it would not prove any allegation which the defendant has made in his own pleas. But had it been pleaded, it would have been bad on demurrer; the suit against the co-obligor of course is no release, nor is such a discharge. The act of 6th June, 1798, authorised the secretary of the treasury, under certain circumstances, to order the discharge from custody of any person imprisoned upon execution for a debt due to the United States; and the act of 3d March, 1817, authorised the president to do the same, in any case which did not permit a discharge by the secretary, under the power given him in that act; but both laws expressly declare, that "the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then or at any time afterwards belong to the debtor." It was under this law that the president acted; of course what he did was subject to its limitations; to extend it beyond those limitations, would be to give to the acts of the executive officer, an interpretation which would defeat the very object of the law. The legislature intended merely to relieve the person of one obligor from custody; this intention was just, and legal; it cannot be construed into a meaning which would be in fact the reverse. 1 Story's Laws, 506. 3 Story's Laws, 1652. The United States v. Stansbury, 1 Peters, 573. Hurst v. The United States, 1 Gallison, 32. The United States v. Sturges, 1 Paine, 525.

2. As to the evidence offered in regard to the stoppage of the defendant's pay, it is to be remarked that it can have no possible bearing on this case. The whole transaction occurred before this account of Thomas Burrowes was settled; all the money actually retained is credited; and what is said in regard to the closing of the account, relates to the pay of the defendant in his own right, not to his liability as a surety.

SYKES and J. C. BIDDLE for the defendant.

The error made by the plaintiffs, as to this evidence, arises from their endeavouring to separate into parts that which ought to be taken altogether. The defendant asserts that he owes nothing, that he has paid all the United States intended or expected he should pay, and consequently that he has satisfied their claim. This may not be proved by taking separately each particular fact offered in evidence, but it is the result of the whole of them taken together. The acts of the president, the auditor, and the secretary, are links in the chain; the whole series shows that the United States intended to release both the sureties. The plea is a general one, and the evidence offered by the defendant, taken altogether, will sustain it; it is not therefore to be rejected by considering it in parts. As soon as it was discovered that, at the time of his death, Thomas Burrowes was a defaulter, the United States looked to his sureties for indemnity. They first proceeded against the defendant, who, being a surgeon's mate in the navy, was entitled to compensation. According to the provisions of the second section of the act of 4th May, 1822, his pay was detained at the treasury, "to be applied," as is expressly stated by one of the letters now offered in evidence, "as an offset for the amount for which he was liable as surety of Burrowes." This continued till the 30th June, 1823, when, as is also expressly stated in another of the letters offered in evidence, "the defendant's account was closed by order of the secretary of the navy, and his pay restored as before;" which could not have been legally done had he still been "in arrears to the United States." They then proceeded against the other surety Edward M'Gee, and carried on the suit to final judgment and execution, which of itself operated as a release of the co-obligor, the present defendant, and consequently is good evidence under the general plea of 'nil debet.' The whole proceedings therefore taken together; first, the closing of the defendant's account and payment of his compensation when it ought to have been retained if he owed any thing; and secondly, the discharge of the other

surety without the consent of the defendant; are proof that the officers of the United States considered the debt now claimed as satisfied. 7 Laws of the United States, 50. Rowley v. Stoddard, 7 Johnson, 206. M'Lean v. Whiting, 8 Johnson, 262.

DALLAS for the United States, in reply.

The neglect of the public officers to retain the defendant's pay, after the 30th June, 1823, is no evidence either of payment or release. If they had neglected to retain it altogether, it would not have affected his liability. No point is better settled, than that the laches of a public officer do not affect the rights or claims of the government. So far as the defendant paid any money, he is entitled to credit; but nothing else can give it to him, whether the public officers were negligent, or whether they intended to release him. As to the discharge of Edward M'Gee, it has nothing to do with this case; the judgment against him remains in full force; therefore, the rights and liabilities of his co-obligor are in no respect affected, by the act which the evidence offered would establish. We admit the fact, but we deny altogether its bearing; it is not therefore proper evidence. United States v. Kirkpatrick, 9 Wheaton, 720.

Judge HOPKINSON rejected the evidence in regard to the discharge of Edward M'Gee, observing that the common law principle was clear, which precluded the introduction of evidence having no bearing upon the issue. This discharge could not serve the defendant under his plea of payment, even if it were proved, because the act of Congress, by virtue of which the discharge was made, is a mere release of the person, but does not affect the debt. It was not so however in regard to the transactions of the treasury and navy departments, with the defendant; it was impossible to say that they did not contain proof, to a greater or less degree, of payments made by him on account of this liability. They ought therefore to be received in evidence, leaving for future consideration, the extent to which they operate.

The case went to the jury on this evidence, and Judge HOPKINSON delivered the following charge:

The execution by the defendant of the bond on which this suit is brought is admitted; so of the condition and the breach. The account of Thomas Burrowes, the principal in the bond, was not settled until the 29th November, 1823, when it appeared there was due from him to the United States a balance of one thousand two hundred and ninety-six dollars and twelve cents. Burrowes died in the year 1821, and was known or supposed, some months after, to be a defaulter although the amount was not ascertained; for on the 5th October, 1822, the fourth auditor wrote to the purser of the navy yard at Philadelphia, directing him to retain the pay of the defendant, Dr. Beattie, to meet the delinquency of Burrowes. On the 30th June, 1823, the secretary of the navy wrote to the defendant that his accounts were closed, and he was thereafter to receive his pay and rations as a surgeon's mate. On this settlement of the accounts of the defendant, there appeared to be due to him two hundred and sixty-six dollars and eighty-seven cents, which were retained to meet his responsibility for Burrowes, whose account was not yet settled; and, of course, the amount of that responsibility was not ascertained.

It is now contended by the defendant, that these letters, from the fourth auditor and the secretary, sustain his plea of payment of this bond; and show that all claims upon him by the United States, not only on his own account but also as the surety of Burrowes, were entirely closed. This is an affirmative allegation, and it is incumbent upon the defendant to prove it to your satisfaction. He alleges that the account settled in June, 1823, was not merely of his own transactions with the government, but included the sum for which he was liable as the surety of Burrowes. If such be the fact, he could have shown it conclusively by producing the account. You would then have seen for yourselves of what items or particulars it is composed; you would have certainly known whether the sum of two hundred and sixty-six dollars and eighty-seven cents is simply

the balance of the defendant's own account with the government, or whether the account goes beyond this, and charges him with the balance of Burrowes, now demanded of him, or any part of it. The account is not produced, nor is there any rational presumption to be drawn from these letters that such was the case; on the contrary, I do not see how it could be so. The account of defendant was settled some time antecedent to the 30th June, 1823, for on that day the secretary informed him of it. Now it was not until the December following that Burrowes' account was settled, and the amount of his debt to the United States known, to wit, one thousand two hundred and ninety-six dollars and twelve cents. It is evidently impossible that this amount could have formed a part of, or have been an item in, the account of Beattie, which was closed six months before; unless we are driven to the improbable presumption that the amount of Burrowes' balance was anticipated and assumed in the settlement of Beattie's account. If this was done the account itself would show it. The allegation, therefore, that the money due from Burrowes has been paid by the defendant in the settlement of his own account is altogether unsupported. The letter of the secretary could have referred only to the private account of Beattie himself. If, on the final adjustment of the account of Burrowes, it had appeared that he was not indebted to the government at all; or not to the amount of two hundred and sixty-six dollars and eighty-seven cents, the sum retained from Beattie; would he not have had a just and legal claim for the return of this money? Could he have been told, your account is closed? It is true the secretary informs him that he shall thereafter receive his pay, but does the relinquishment for the time of a harsh remedy, extinguish the claim? It was a liberal and equitable indulgence on the part of the secretary; it was perhaps but strictly right, that the earnings of the defendant should not be withheld from him, to meet an unascertained balance from a debtor for whom he was a surety, and where, whatever might have been the reasonable anticipation, it could not strictly be

said that any forfeiture or breach of the bond had taken place. Whatever were the motives of the secretary in renewing the defendant's pay, as an officer in the service of the government, it can never have the effect of discharging him from the obligations of his bond.

We find further, that in March, 1825, the auditor of the treasury wrote to the defendant, informing him that the balance due to him would be applied as an offset to the amount for which he was indebted to the government as the surety of Burrowes. To this he made no answer or complaint, asserting as he now does, that his responsibility was paid and discharged on his account settled in June, 1823. From this it would seem, that neither the accounting officers of the treasury, nor Dr. Beattie himself, considered that this settlement embraced any thing but his private account, and had no relation to any claim upon him arising from the suretyship for Burrowes.

This is the whole testimony you have to act upon, for I consider the discharge of Edward M'Gee, the other surety, to have no relevancy to the case of the defendant. You will give him credit for the two hundred and sixty-six dollars and eighty-seven cents.

The Jury found a verdict for the United States for thirteen hundred and sixty-eight dollars and eighty-seven cents.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

AUGUST SESSIONS, 1829.

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JOSEPH JOHNSON

*v.*

THE SCHOONER M'DONOUGH.

1. A wharfinger has a lien on a vessel for wharfage.
2. If a vessel is removed from a wharf secretly or wrongfully, and afterwards brought back without fraud or force, the lien of the wharfinger is revived.
3. Where the marshal levies on, but does not keep actual possession of a vessel, which had been removed from a wharf without the knowledge of the wharfinger, and she is subsequently returned to the same wharf, the wharfinger is to be paid his previous wharfage, out of the proceeds of a sale under the execution, made subsequent to her return.

ON the 1st May, 1829, suit was brought by the United States of America, against James Coulter and John Coulter on a custom house bond for the payment of duties. On the 18th of May, judgment was rendered for the United States, and on the 21st May, a writ of fieri facias issued. On the 2d October, the marshal returned the writ, and brought into court the proceeds of the sale of the schooner M'Donough, which he had levied upon as the property of James and John Coulter. On the same day Joseph Johnson filed his petition, praying that the sum, due to him for the wharfage of the schooner, might be paid out of the funds brought into court by the marshal.

On the same day Judge HOPKINSON delivered the following opinion:

The facts of this case appear by the evidence to be these. On the 3d December, 1828, the schooner M'Donough was put at the wharf of Joseph Johnson, the petitioner, by her owner James Coulter, and remained there until the 15th April, 1829, when she was removed to another wharf by Israel Coulter the brother of James. This removal was made without the consent or knowledge of Johnson, and at dinner time, when the persons usually about the wharf were absent. Johnson, on being informed of the removal, immediately complained of it to James Coulter, who had before assured him that the vessel should not be removed, until the wharfage was paid. James Coulter replied to his complaint, that Israel Coulter had no right to take her away, and that he would have her brought back. She was brought back on the 2d June, 1829. On the 21st May, 1829, a writ of fieri facias, issued on a judgment against John and James Coulter, at the suit of the United States, was delivered to the marshal, who proceeded with it to the schooner, then lying at the wharf to which she had been removed; he went on board the schooner, and, as he says, executed his writ by a levy on her. The schooner was at this time stripped of her rigging, which had been done after her removal from Johnson's wharf; she was entirely shut up, and had nobody on board of her. The marshal put no person in charge of her, but left her as he found her, though he says a Mr. Burton told him he had a person to watch other vessels, who should also take charge of this schooner. Whether Mr. Burton performed this promise or not, the marshal never inquired, nor do we know. From other facts in the case we should infer that he did not. The marshal made no further proceeding on his writ, in consequence of his being informed that Coulter had sold her before the writ issued, but he further says, that he did not abandon his levy. Did he, however, preserve his possession? I think he did not. On the 2d June, nearly two weeks after this proceeding under the fieri facias, the schooner was brought back to Johnson's wharf, without any prevention or objection on the part of the marshal, or of any person he may

have supposed had charge of her. She was afterwards sold by the marshal at Johnson's wharf; the proceeds of the sale are now in court; and Joseph Johnson claims to be paid out of them for his wharfage from December, 1828, to April, 1829; that which was due for the second lying at his wharf being satisfied. On the other hand the United States claim the whole of the proceeds towards the satisfaction of their judgment.

It was long since decided in this court by Judge Peters, that wharfage is allowed out of proceeds, as the wharfinger might detain the ship until payment; in other words, that a wharfinger has a lien on the vessel for his wharfage. Judge Story, in the case of Lewis (2 Gallison, 483,) has recognised and affirmed this principle. In this case it has not been questioned, but it has been insisted by the district attorney that the lien was lost, by the loss of the possession of the schooner. It is certainly true that when the possession of a chattel is voluntarily given up, or other security is taken for the debt, the lien is abandoned. But this act, like every other, must be coupled with the will and intention of the party. Can I be said to part with an article which is wrongfully taken from me, without my knowledge or consent? And if I afterwards regain my possession, without any wrong to another, am I not restored to my original rights? Whether I may retake the possession by my own authority is another question, and even that seems to have been allowed in the case of Rosse v. Barnsteed, (2 Rolle, 438,) provided it be done on fresh pursuit. I admit that the consent to the change of possession may be given, and will be as effectual after as before the removal; and further that such consent may be inferred from the conduct of the party, as well as by direct evidence. If, in this case, Joseph Johnson had made no complaint of the taking away of the schooner, until she was levied upon, it would have warranted a belief that he acquiesced in it; but, on the contrary, he made immediate complaint, and received a promise from James Coulter, not of the payment of the wharfage, but of the return of the vessel to his wharf. What more could he do to repel the presumption of his assent to the

act, or to show that he held to the body of the schooner as the security for his debt, and looked to no other? He could not take forcible possession of her; nor do I know of any legal process, by which he could have had her restored to him. If a possession is gained wrongfully or fraudulently it gives no lien; so if it be given for a special purpose, it cannot be applied to another. The same equity requires that if the possession be lost wrongfully or fraudulently, and be afterwards regained without fraud or wrong, the lien shall be in force.

In the case of Spring v. The South Carolina Insurance Company, (8 Wheaton, 268,) it is expressly said by the court, that an insurance broker is entitled to a lien on the policy for premiums paid for his principal: and though he parts with the possession, if the policy afterwards comes into his hands again, his lien is revived and will be protected, unless the manner of his parting with it had manifested an intention in him altogether to abandon such lien. The parting with possession was voluntary.

In the case of The United States v. Barney, (3 Hall's Law Journ. 128,) Judge Winchester says, a lien is a tie, hold, or security upon goods or other things which a man has in his custody, till he is paid what is due on them. From this definition, he adds, it is apparent that there can be no lien where the property is annihilated, or the possession parted with voluntarily and without fraud. He quotes Chapman v. Derby, (2 Vernon, 117,) and ex parte Ockenden (1 Atkyns, 234.)

In Montague on liens, page 19, it is said if an innkeeper suffer the horse of his customer to be taken away, and the horse is, on some future occasion, brought to the inn, the lien does not revive. In the same book and page it is said, that if an insurance broker parts with the possession of a policy upon which he has a lien, and afterwards, upon hearing reports not favourable to the circumstances of his principal, he obtains from him the policy under pretence of receiving the average, it has been decided that his lien revives. This is going very far indeed beyond the decision in the case of Spring v. The South Caro-

lina Insurance Company, and beyond what is necessary for our case.

In the case of Levy v. Barnard, (2 Moore, 34,) it is said; "it seems that if a broker part with a policy, his lien revives upon its being returned to him."

Such is the uniform doctrine of the decisions upon this point, and no case has been produced or found on my examination, in which a wrongful or fraudulent dispossession of the article would so destroy the lien, as that it would not revive on a subsequent honest regaining of the possession.

The loss of the possession in this case was certainly not by the consent or intention of Joseph Johnson; nor did he, by any subsequent agreement or act, acquiesce in it. The only circumstance relied on to prove his assent is the length of time; but what could he do, in that period, to show his dissent, more than he did? It was returned to him without any wrong or fraud on his part; and by the same person who had taken it away, and probably for the very purpose of making it liable to his claim.

I am therefore of opinion he is entitled to the payment of the wharfage due to him, out of the proceeds of the sale of the schooner.

It is proper to add, that there is much uncertainty and obscurity about this levy; or, at least, about any actual possession of the property by the marshal, or what his intentions were in respect to it, after he was informed that Coulter had sold it. He suspended all further proceedings, and seems to have had no custody or care of it afterwards; until he actually sold it at Joseph Johnson's wharf. If the marshal had taken a clear possession of the vessel, and thereby divested Coulter of the possession; and the latter had afterwards fraudulently and wrongfully taken her and returned her to Johnson's wharf, in violation of the right and possession obtained in her by the marshal, it would have presented a different question, on which I give no opinion. The case of Spring v. The South Carolina Insurance Company, (8 Wheaton, 268,) will be found to bear, even on such a case, favourably to the claim of wharfage.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

NOVEMBER SESSIONS, 1829.

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THE POSTMASTER GENERAL OF THE UNITED STATES

*v.*

JOHN NORVELL.

1. A bond given by a postmaster, with sureties, for the performance of his official duties, does not constitute a binding contract, until approved and accepted by the postmaster general.
2. The reception and detention of an official bond, by the postmaster general, for a considerable time, without objection, is sufficient evidence of its acceptance.
3. The return of an official bond to the principal obligor, by the postmaster general, for the purpose of obtaining an additional surety, affords no proof that it had not been accepted; nor does it amount either to a surrender or cancelling of it.
4. Where a debtor, indebted on several accounts, makes a payment, he may apply it to either account; if he does not, the creditor may do so; if neither does, the law will appropriate it according to the justice of the case, provided there are no other parties interested.
5. A debtor cannot appropriate a payment, in such manner as to affect the relative liability or rights of his different sureties, without their assent.
6. Where a public officer has given successive official bonds with different sureties, moneys received subsequent to the execution of the latter, cannot, before it is discharged, be applied to the payment of the former.
7. Where a public officer has given different bonds with different sureties, his payments must be so appropriated as to give each bond credits for the moneys respectively due, collected, and paid under it.
8. The law which limits suits by the postmaster general against sureties, to two years after a default of the principal, does not operate in cases of balances unpaid at the end of a quarter, which are subsequently liquidated by the receipts of a succeeding one.

On the 7th June, 1825, the postmaster general addressed a letter to Richard Bache, then postmaster at Philadelphia, in which he stated, as follows: "Some weeks since I directed a bond to be sent to you as postmaster, that you might have it executed under the post office laws, passed at the last session of Congress. This measure has become necessary by reason of the decision of Judge Johnson, who lately decided that bonds given by a deputy postmaster, under the law lately repealed, could not be enforced. Although I believe this decision to be erroneous, and that the Supreme Court will reverse it, yet, it becomes my duty to guard the public interest, by taking the precautionary step of renewing the bonds of all postmasters which were executed under the late law. I will thank you to inform me whether you have received the bond transmitted to you. If you have not another shall be sent."

On the 15th of June, Mr. Bache acknowledged the receipt of this letter, and said that the delay in returning the bond had been occasioned by one of the gentlemen, whom he wished as his surety, being out of the city, but that it should be executed and sent in the course of the week.

On the 1st July, the usual quarterly settlement of his accounts as postmaster was made, and it appeared that the debits against Mr. Bache, on that day, exceeded his credits or payments by the sum of twenty-six thousand nine hundred and forty-nine dollars and nineteen cents, leaving him indebted to the United States in that sum at that time.

On the 8th July, Mr. Bache, together with William Milnor, jr. and John Norvell, executed a joint and several bond to the postmaster general in the penal sum of thirty thousand dollars; being the same which was referred to by that officer in his letter of the 7th June. The condition of the bond set forth that Richard Bache was then postmaster at Philadelphia, and it provided, "that if the said Richard Bache should well and truly execute the duties of the said office, and faithfully, once in three months and oftener if thereto required, render accounts of his receipts and expenditures as postmaster to the general

post office, in the manner and form prescribed by the postmaster general, in his several instructions to postmasters, and should pay all moneys that should come to his hands, for the postages of whatever is by law chargeable with postage, to the postmaster general of the United States for the time being, deducting only the commission and allowances made by law for his care trouble and charges in managing the said office; and should also faithfully do and perform, as agent for the general post office, all such acts and things as might be required of him by the postmaster general; and moreover should faithfully account with the said postmaster general, for all moneys, bills, bonds notes, receipts, and other vouchers, which he as agent as aforesaid should receive for the use and benefit of said general post office," then the bond was to be void. On the back of the bond was a certificate of the same date, by an alderman of of the city of Philadelphia, that "in his opinion the sureties therein were sufficient."

This bond was transmitted to the post office department; on what day is not ascertained, but probably about that on which it bears date.

On the 15th September, another settlement of Mr. Bache's accounts as postmaster took place, by which it appeared that from the 8th July, the date of his bond to that day he had paid the sum of twenty-nine thousand seven hundred and forty-six dollars and sixteen cents, extinguishing the balance due on the previous quarter, and leaving a credit in his favour of two thousand seven hundred and ninety-six dollars and ninety-seven cents.

On the 21st September, the bond was returned to Mr. Bache by the postmaster general, inclosed in a letter in which he stated, as follows: "I am informed that William Milnor, jr. whose signature is placed to the inclosed bond, as one of your sureties, possesses little or no property. As two sureties are required by the rule of the department, it is proper that they should both be in such circumstances as to property as to make their responsibility safe for the public. If the fact be as above stated as

to Mr. Milnor, it will be necessary for you to procure another signature to your bond. I have purposely delayed returning this bond, until after you had paid the late requisition of the department, in order that its return might not embarrass you. As you have more than complied with the requisition, and reduced your balance to a small sum, I presume you will have no difficulty in complying with this request."

On the 15th December, Mr. Bache wrote to the postmaster general that he would attend to the surety the following week, "when he hoped to forward one that would meet his approbation."

On the 12th June, 1826, the postmaster general wrote to Mr. Bache, that "his bond yet remained to be perfected."

On the 14th March, 1828, the assistant postmaster general wrote to Mr. Bache reminding him of the assurances given in his letters to the department, and asking his immediate attention to the return of his bond with the additional surety required on the 21st September, 1825.

On the 7th April, the postmaster general himself addressed a letter to Mr. Bache, in which he stated as follows: "Col. Gardner informs me that you have not returned your bond as postmaster with the additional surety necessary. I regret that this subject has not been attended to by you before, and hope you will lose no time in procuring an additional name to your bond, which may be good for the amount of the penalty; at least, the whole number should be considered good for that sum. I was not aware until a few days since, that the bond had not been returned."

On the 14th April, Mr. Bache informed the postmaster general, in reply, that he would "give him a definitive answer in the course of the next day respecting his bond, after seeing some of his friends."

On the 20th April, Mr. Bache was superseded as postmaster; and on the 13th May, the bond in question was deposited with the attorney of the United States, "to be retained until it was

decided who had a just claim to it; as it was claimed both by the postmaster general and the sureties."

On a settlement of the accounts of Mr. Bache, it was found there was a balance due by him of twenty-two thousand two hundred and thirty-five dollars and fifty cents; thereupon separate suits were instituted, in this court, against him as principal obligor, and Mr. Milnor and Mr. Norvell each of the sureties in the bond.

The declaration in the present action against John Norvell is for the amount of the penalty in the bond. It sets out the condition at length, as above stated, and then avers the non performance thereof by the postmaster, Richard Bache, in all particulars, but especially "in not paying the said sum of twenty-two thousand two hundred and thirty-five dollars and fifty cents, being money that had come to his hands for postages." To this the defendant pleads; 1. That the bond was not accepted by the postmaster general, and so was not delivered by the defendant John Norvell, and that it is not his deed. 2. That Richard Bache did, during the time he was in office, after the date of the bond, truly execute the duties of his office, and that he did not make default by not paying the said sum or any other sum of money whatever.

On the 17th November, 1829, the case came on for trial before Judge Hopkinson and a special jury. It was argued by Dallas, District Attorney, for the postmaster general, and Swift and Randall for the defendant.

Dallas for the postmaster general.

The defendant has voluntarily entered into a contract with the United States, which, however its existence may be regretted, it becomes a plain duty of the court to enforce. Such contracts are necessary by law, and it is a loose and dangerous morality which would set them aside, merely because they may ultimately bear hard on those who have made them.

This is an action to recover a debt due upon a bond in consequence of an alleged breach of the condition. The sum claimed

is the amount to which the United States say they have been injured by that breach. This bond has been produced and given in evidence; it is in all its requisites apparently complete; it has parties, with their signatures and seals duly attested by subscribing witnesses; in all these incidents nothing has been alleged to affect its validity. The condition of the bond is distinct and legal; and, if it has been broken in any of its particulars, the penalty is incurred and the damage has been produced. That it has been appears by the account of Mr. Bache, the postmaster at Philadelphia and the principal obligor in the bond. The account, as given in evidence, is a transcript authenticated according to law; a running account of receipts and payments taken from the books; a reckoning between the government and its agent. It shows the moneys that were received by the postmaster from postages between the date of the bond, when the obligation of the defendant commenced, and the time this suit was brought. It proves conclusively that all the money received during this period was not paid when the balance was finally struck. This is a breach of the condition of the defendant's obligation and makes him liable on his own contract. 3 Story's Laws, 1996.

No facts given in evidence impair the validity of the defendant's obligation under the bond. It was entered into by express authority of law. It was transmitted to the postmaster general after it had been duly executed at his own request. It was received and retained by him as a legally executed instrument. The purposes for which it was sent back did not relate to Mr. Norvell the defendant. There was no objection whatever to him. His name was not to be taken from the bond. Whatever objection there was related to Mr. Milnor alone. Nor was it sent back for any cause affecting its validity; but merely to increase its security. 3 Story's Laws, 1986. Smith v. Bank of Washington, 5 Serg. & Raw. 318. North v. Turner, 9 Serg. & Raw. 244.

Nor were any facts given in evidence to controvert the correctness of the account. It is clear that there was a balance

in favour of Mr. Bache, of two thousand seven hundred and ninety-six dollars and ninety-seven cents on the 15th September, 1825, and a balance against him of twenty-two thousand two hundred and thirty-five dollars and fifty cents, when he was superseded; showing that, after the date of the bond, he had received moneys to the amount claimed, which he had not paid over. In settling the account, the postmaster general had a right to appropriate the intermediate payments by Mr. Bache to the extinguishment of his debt, in such order as he deemed best. When a man is indebted on several accounts and makes a payment he may direct its appropriation; if he does not the receiver may; if neither does, the law will appropriate it justly and equitably. It is just and equitable that payments should be appropriated to extinguish debts according to their order of time. Applying this rule, Mr. Bache became in arrear during the last quarter. The account shows a superabundance of payments, in each quarter, to pay what was due on the antecedent quarter. The settlements were made and the balances struck quarterly; and the United States have applied the money paid during each quarter, to any arrears that might be due at its commencement. This they had a clear right to do especially as Mr. Bache made no appropriation. The account, therefore, being unimpeached as to the correctness of its items, shows that the balance was due when suit was brought, that it is chargeable to the last quarter, and that it is for postages received and not paid. 3 Story's Laws, 1996. Mayor of Alexandria v. Patten, 4 Cranch, 317. Field v. Holland, 6 Cranch, 8. United States v. January, 7 Cranch, 572. United States v. Kirkpatrick, 9 Wheaton, 720. United States v. Vanzandt, 11 Wheaton, 184. United States v. Nicholl, 12 Wheaton, 505. Dox v. Postmaster General, 1 Peters, 318. Postmaster General v. Reeder, 4 Washington, 678. Cremer v. Higginson, 1 Mason, 324. Locke v. Postmaster General, 3 Mason, 446.

SWIFT and RANDALL for the defendant.

This is a contract between the postmaster general and the defendant. He is the officer who is authorised by law to make

it, and the United States, in conferring on him the power, become bound by his acts in the exercise of it. He must do his duty properly; if he neglects or errs in it they are to suffer. His actions are their actions, and if the surety derives a benefit from them, it would be the height of injustice to deprive him of it, on the plea that no laches can be imputed to the government. Hodgson v. Dexter, 1 Cranch, 345. Bainbridge v. Downie, 6 Mass. Rep. 253. Walker v. Swartwout, 12 Johnson, 444. Macbeth v. Haldimand, 1 Durn. & East, 172.

We are to ascertain, therefore, whether there is now any existing contract between the postmaster general and Mr. Norvell, and if so, whether this contract binds him to pay the sum of money demanded.

I. There is no such contract now existing, because the bond was not a valid instrument at the time the suit was brought. It is true it was signed and sealed by the defendant, but that is not enough, an unqualified, unconditional delivery of it by him is equally necessary, and also an unqualified unconditional acceptance by the postmaster general. There is no positive evidence that this bond was ever sent to Washington; but supposing that it was, this is not a case in which mere possession will prove either its delivery or acceptance. That might be enough in an ordinary case, but not where the approbation of a public officer is made essential to its validity. Until that is given the instrument is imperfect and incomplete. The only evidence of his approbation is his acceptance of it; without acceptance there can be no delivery, in fact there is a refusal to receive, so far as the interests of a surety are involved. In this case there is no proof of the postmaster general's approbation; on the contrary, he returned the bond as insufficient; in his own words he required it to be "perfected." On the most obvious principles of law, therefore, there is not now, and indeed never was, a perfect or binding contract made by this defendant with him. 3 Story's Laws, 1986. 1995. 1 Shepherd's Touch. 57. Whelpdale's case, 5 Coke,

119. Chamberlain v. Stanton, Croke Eliz. 122. Jackson v. Phipps, 12 Johnson's Rep. 418.

But even if approved at first, it was afterwards returned by the postmaster general, as insufficient, an act clearly within his legitimate power. He is by law expressly directed to superintend all the duties of his department, he is required to take from postmasters security which is good and approved, and of course, to reject what he believes or discovers to be inadequate. As he can have but one bond at the same time from one officer, to deliver it up for the purpose of obtaining a better, is clearly within the scope of his authority. That he meant to do so here is evident. His letter states, that it is returned, because it is insufficient. It is allowed to remain for nearly three years in the possession of the obligor, and it has now become evidence only because it has been placed in the possession of the attorney of the United States, for the purposes of this suit, but not so as to affect the rights of the sureties. 3 Story's Laws, 1985, 1986. Shepherd's Touch. 70. 2 Blackstone Com. 307. 309.

It cannot be said that it was returned for the purpose of being altered; of having another name inserted in the same instrument of writing; for that would be illegal. Such an alteration without the consent of the defendant would completely invalidate it; it is immaterial whether the object be to increase or decrease the liability of any party. Whether it does injury or not to the obligor; whether the change be trifling or material, whether the motive be good or bad; it is sufficient that the identity of the instrument is changed. Speake v. United States, 9 Cranch, 28. Moore v. Bickham, 4 Binney, 1. Stephens v. Graham, 7 Serg. & Raw. 505. Marshall v. Gougler, 10 Serg. & Raw. 167. Barrington v. Bank of Washington, 14 Serg. & Raw. 405. Homer v. Wallis, 11 Mass. Rep. 309. Jackson v. Dunlap, 1 Johnson's Cases, 114. Pigot's case, 11 Coke, 27. Master v. Miller, 4 Durn. & East, 320. Johnson v. Baker, 4 Barn. & Ald. 440.

II. But even if this bond had been completely executed; if it had been delivered, accepted, approved and retained by the postmaster general; if it were now an existing contract between him and the defendant, he is not bound by it to pay the sum of money above demanded, because the debt has not in fact accrued since the bond was given. The balance is not created by a neglect to pay over the moneys received, but by the act of the postmaster general himself, in appropriating improperly the payments of Mr. Bache. No doubt where a debtor, having several accounts, makes a payment to his creditor without any specific direction, it may be appropriated at the pleasure of the latter, where they are the only parties. But this cannot be done where the interests of a third party are affected. In such a case the right of appropriation does not apply, and this is one. There was a balance of twenty-six thousand nine hundred and forty-nine dollars and nineteen cents, due by Mr. Bache at the time this bond was executed; for the payment of this the postmaster general ought to have looked to the previous security, but he has paid it by applying the money received subsequently. Mr. Norvell is not security for that debt, yet money collected whilst he is security, is taken to pay it, and he is then called on to make good the deficiency. This is in effect charging him as surety for a default which occurred before he gave bond. The amount with which he is thus charged exceeds that now demanded; consequently if he is improperly charged with it, there is no default which has accrued since he became responsible. United States v. January, 7 Cranch, 572. United States v. Wardwell, 5 Mason, 87. Armstrong v. United States, Peters C. C. Rep. 46.

On another ground, the postmaster general cannot recover this balance from the defendant. The act of congress declares, that when a postmaster makes default, the postmaster general must institute suit against him and his sureties, within two years after such default, or the sureties shall not be held liable. Mr. Bache has been a defaulter at every quarterly settlement since the 1st October, 1825, sometimes to the amount of twenty-nine thou-

sand, never for less than fourteen thousand dollars. As no suit was instituted till 1st July, 1828, the parties have ceased to be liable. It was due to them that suit should be brought as soon as a default was discovered. This provision was for their benefit; they are favoured by the law; to deprive them of it would be to turn the plainest principles of the law against them. 3 Story's Laws, 1986. Miller v. Stewart, 9 Wheaton, 680. Commonwealth v. West, 1 Rawle, 31.

DALLAS, for the postmaster general, in reply.

I. The first ground on which the defendant resists the claim which the United States have acquired by his breach of his own contract, is by alleging that he in fact has made no such contract; that the paper produced is not his deed; in other words, that although it has form, shape, and features, it wants the life imparted by delivery and acceptance. Such an allegation will fall before an examination of the case. That the bond was actually delivered for the purpose it expresses, to the postmaster general, is incontrovertible; that he received it is equally so; all, therefore, that the defendant had to do was done. Against him, it remained a valid instrument; at all events until the 21st September, 1825. On that day it is said the postmaster general did what in effect cancelled it, by showing he had not accepted it. That he received and retained it for more than two months is beyond question; but, because, after thus retaining it, he doubts its sufficiency, it is alleged that he never accepted it. As the evidence stands, the question whether he did so or not, is purely one of law, to be resolved by written documents. These will show at once what the postmaster general meant, as well as what he did; his object, as well as the mode by which he attained it.

His object certainly was neither the relinquishment nor destruction of the existing bond, nor the substitution of another for it; it was simply to obtain additional security, a desire which indeed, *ex vi termini*, imports an acceptance, *pro tanto*, of the security already given. It has indeed been said that this object was inconsistent with the legal existence of the bond; whether

it was so or not, is really irrelevant to the present argument, since no additional surety was obtained, no change was made in the parties. But it was not so; on the contrary, the object of the postmaster general, had it been attained, was perfectly consistent with the legal validity of the bond. The cases cited are all cases of erasure, interlineation, substitution, addition, or alteration, without consent of the parties, affecting the rights of some of them, and material. This would have been a case of addition, with consent of all the parties, and beneficial to all. The bond being several, an additional signature would not have affected the defendant in his relation to the United States, and would have been beneficial to him in contribution.

The object of the postmaster general therefore being simply to procure additional security, an object perfectly consistent with the legal existence of the bond, it remains to show there was nothing in the mode adopted by him, to obtain this additional security, which affected the rights of the United States, or the liability of the defendant. It is true he parted with the temporary possession of the bond, but that possession is neither necessary to preserve the rights of the United States, nor to destroy the liability of Mr. Norvell; the right, the control, the legal possession, was never given up; it was sent away for a specific purpose, its return was required, its detention was in disobedience of the directions of the postmaster general, and therefore never could defeat his rights. To review the cases cited, of conditional deliveries and acceptances, is unnecessary; because this bond was sent to the postmaster general without condition, not casually, but with the knowledge of all parties, and deliberately received and retained by him. To argue that, after becoming thus unconditionally possessed of it, his sending it to Mr. Bache for the sole purpose of obtaining another signature, was a refusal to accept it, is to presume a deliberate intention on his part to relinquish what he required to be returned, to destroy what he wished to strengthen. As far as deliberate intention is involved, it is absurd to suppose that he foresaw and desired to do any thing inconsistent with the legal existence

of the bond. But if he really had such a desire, he intended to do what was not legally within his power. If the laches of a public officer will not affect the interests of the United States, neither will an intentional departure from authority. The idea that a public officer, because he is at the head of a particular department, or has the general superintendence of its business, possesses an unlimited control over the property or interests of the United States connected with that department, cannot be tolerated for a moment. His power is deducible from law alone, and is always compatible with an object contemplated by law; if the mode of exercising it be prescribed, he must pursue it and no other; if no mode is specifically directed, a discretion may indeed be implied, but not one inconsistent with, or destructive to, the object of the law. The postmaster general, as superintendent of his department, is bound to exact security from an officer, before he permits him to act, and when obtained, although he may change it for equally good or better, he cannot relinquish or destroy it altogether. The principles, indeed, which regulate or restrain him, as a public agent, are the same as those relating to a private one; acts within the scope of his authority bind the principal; beyond it, they affect neither his rights nor interest.

The results then of the whole argument, relative to the delivery and acceptance of this bond, to the object of the postmaster general in returning it, and to his whole conduct in regard to it, are these: that no express acceptance is necessary in receiving such an instrument from a postmaster for the United States; that if necessary, it was fully given, when, in asking additional security, he necessarily accepted, *pro tanto*, what he had received; that its implied acceptance is apparent from its detention, its return for a specific purpose, and its repeated demand; that once given, and received, it belongs to the United States, and cannot be relinquished by their officer, without equal or better security; and that, never having been relinquished, it remains the valid evidence of a contract of the defendant with the United States. Hodgson v. Dexter, 1 Cranch, 345. United States v. Kirk-

patrick, 9 Wheaton, 720. Bainbridge v. Downie, 6 Mass. Rep. 253. Walker v. Swartwout, 12 Johnson, 444. Macbeth v. Haldimand, 1 Durn. & East, 172.

II. The second ground on which the defendant resists the claim of the United States, is, that admitting the due execution, delivery, and acceptance of his bond, he is yet protected from suit by an express provision of law. The act of congress does indeed provide, that the defendant cannot be sued if there was a default by Mr. Bache, if it continued for two years, and if the postmaster general did not institute his suit during those two years. But it is not enough to say Mr. Bache was tardy in his payments, and in arrear at every quarterly settlement; if the arrears were paid off within two years, and fresh default made, it is not the same in time or amount. Now the account shows that there was no default which remained unpaid for six months, much less two years; it was settled quarterly, and each debit is for the postage of an entire quarter, though the credits are at various times; if at the end of the quarter these credits fell short of the amount of postages then debited, the next payment was of course applied to extinguish that arrear. Such is the usual way of keeping a running account; it is exactly that which exists between a landlord and tenant, who would certainly apply what he might receive in the middle of a quarter, to extinguish the unpaid rent of a previous one. As to what has been said in regard to the appropriation of payments made by Mr. Bache, it is to be recollected that the government, no more than a landlord, knows whence the money comes with which the payments are made; whether the collections of a postmaster are on a prior or current quarter, any more than whether the rent paid is the product of tillage in this season or the last. It is not bound, either by principle or practice, to delve into the modes of financing, by its debtor, in order to ascertain the sources of his payments. The mode in which the postmaster general has appropriated the payments made to him, has been objected to; but his right to do so has been clearly shown by the various adjudged cases heretofore cited; and the practice is established, if

it is not conceded. An examination of this account shows that, with the exception of the first quarter, the sums debited to any one quarter are never paid in until a month or two, or more, after they are due; on the 1st January, 1825, we find a balance against the postmaster of three thousand one hundred and fifty-seven dollars, while on the 15th September, following, having been urged in the mean time to make payments, he has overpaid, by that of two thousand seven hundred and ninety-six dollars. If this examination be carried down on these principles, the correctness of which cannot be doubted, it will be seen that no default occurs until on and after the 1st January, 1828, a period not only within that when the clear responsibility of the defendant as a surety exists, but also long within the two years previous to the commencement of this suit.

The result, therefore, of this inquiry is, that the defendant has failed to establish any thing in the mode of appropriating the receipts of Mr. Bache, adopted by the postmaster general, or in the time and manner of bringing this suit, which will relieve him from the liability he has incurred on the bond, already shown to be duly executed and accepted.

Judge Hopkinson delivered the following charge to the jury:

The bond on which this suit is brought, the condition, and the breach, are all admitted; that is, the signing and sealing of the bond, the terms of the condition, and the breach as laid in the declaration.

The present defendant was not the principal in the bond, but one of the sureties of Richard Bache. He signed and sealed it, but contends that he is not liable to any responsibility under it, on several grounds, some of law, some of fact.

I. He says this bond was never delivered, in the sense of the law, because it was never accepted, without which the delivery is not complete.

It is not denied that the defendant had done all required of him; he had signed, sealed, and delivered it so far as it depended on him. Was an acceptance necessary? I think it was; not only on general principles, but peculiarly so in this case.

It was to be approved by the postmaster general; he was to judge of its sufficiency; and until it was approved and accepted, it was no contract between the parties; it could not be a contract on one side only. Whether an acceptance was necessary, is a question of law; and I clearly think it was.

Then was this bond accepted? This is a fact for your decision. If the question of acceptance depended on written evidence, or documents alone, it would be for the court, with whom the construction of such evidence is entrusted; but when it depends altogether on parol evidence, or partly on that, and partly on written testimony, it is for the jury, from a view of both, to decide the fact. In this case the acceptance is asserted on the one side, and denied on the other, not only from the written correspondence between the parties, but also from facts and circumstances, such as the time that elapsed between the receipt of the bond by the postmaster general and the return of it, a conversation held with me, and some other matters, which are enough to make it a mixed question of evidence, partly written and partly parol.

But it is the duty of the court to give you some instruction as to the law on the subject. An acceptance of this bond by the postmaster general need not be proved by direct or express evidence. It is not necessary he should write, acknowledging the receipt, and accepting the security. It is probable this is never done. But receiving the bond, and detaining it for a considerable time, without objection, will be sufficient evidence of acceptance to complete the delivery; especially when the exception is taken by the party who had done all he could do to complete it. This accords with common sense and justice. In the ordinary case of an account, sent by one merchant to another, no objection being made in a reasonable time is a presumed acquiescence, and binds him. This is a much stronger case. If, therefore, you would not allow the postmaster general to deny his acceptance of this bond, after all he has written or done about it, you will not allow the defendant to do so.

Now, as to the time the bond was kept. This is not exactly

ascertained, but we may make a reasonable presumption. It is dated 8th July, 1825, and one of the counsel for the defendant thinks it must have been sent about the same time. It is probable he is right. Why should it not be? Even then the delay, after the requisition made, had been long; and although this might have been occasioned by difficulty in getting sureties, yet, after they were got, why should Mr. Bache delay to send it, especially as he was hardly pressed for it by the postmaster general? On the 7th June, 1825, the postmaster general writes to Mr. Bache: "Some weeks since I directed a bond to be sent to you, that you might have it executed." The bond must therefore have been sent at least early in May. On the 15th June, Mr. Bache answers, and says, that the delay had been occasioned by one of his sureties being out of the city, and, after his return, occupied by his own business; he adds, "it shall be executed, and sent to you in the course of next week." At this time Mr. Bache was at West Point. On the 8th July the bond was executed in this city, and, under all circumstances, the reasonable presumption seems to be, that it was sent to the postmaster general about the same time. From then, say the 15th July, to the 21st September, 1825, the postmaster general keeps the bond, without an intimation of hesitation or objection to its sufficiency, but with the means to inquire into it, had he thought necessary, in twenty-four hours. Can it be presumed he kept it under consideration all this time, when he does not appear to have made any inquiry to satisfy himself, or to have had any doubt? Did he leave the public interest for more than two months without any security, while he was hesitating, and would neither accept nor reject the bond, nor take a step to satisfy himself? You will judge; but it would be most unwarrantable neglect, and such as should not be supposed, without clear proof, against an officer of high reputation for a vigilant attention to his duty. Would it be in his mouth, after more than two months silent acquiescence, to say he had never accepted this bond? Had he kept an account current for half this time, could he deny his admission of it, at least prima facie?

On the 21st September, 1825, the bond was returned to Mr. Bache, with a letter.

Now, the mere fact of sending it back does not prove that he had not accepted it. He might have fully accepted it for a week, or a year, and then, on finding the security was not sufficient, he might require either a new bond to be substituted, or an addition of security to be made to that he had. The sufficiency of the security is at all times under the direction of the postmaster general. The mere act then of returning this bond affords no proof that it had not been accepted.

If the act, per se, affords no such proof, was it accompanied by any declarations by the postmaster general, showing such an understanding on his part? I reply, that he nowhere denies the acceptance expressly; and that it is not to be inferred from what he has written. In the letter of 21st September, 1825, in which the bond was enclosed, he says he is informed Mr. Milnor, one of the sureties, possesses little or no property. As this information was the cause or inducement to write this letter, we may presume it was recent. Will you not infer from this, that until he got this information, he was satisfied with the bond; and, being satisfied, had accepted it? He says that the rule of the department requires two sureties; he considers Mr. Milnor as standing for nothing "if the fact be so;" leaving it to Mr. Bache to prove the property of Mr. Milnor if he could. But, if the fact be so, what is to be done? Another signature is to be procured. Is there any thing here to show an understanding on the part of the postmaster general that he had not accepted this bond; that he was not entitled to all the security it offered, although he requires something more? The matter remains in this situation, without any communication from the postmaster general, until the 12th June following, about nine months, when the postmaster general writes, "your bond yet remains to be perfected." Can we suppose the postmaster general believes himself all this time without any security? Yet this would have been the case, if he had never accepted the bond, as far as it went. Remember the intention and acts of the post-

master general are to decide this question; for the defendant had done every thing on his part to complete the delivery of the bond. On the 7th April, 1828, the bond is not returned, but remains with Mr. Bache. Two years and a half elapsed, and there is no security. What does the postmaster general now write: "Col. Gardner informs me you have not returned your bond, with the additional security." He hopes he will lose no time in procuring the additional name. In all other respects the bond was to remain, and be returned as it was originally received. On the 14th March, 1828, a letter was written by Col. Gardner to Mr. Bache: "I am directed by the postmaster general to ask your immediate attention to the return of your bond, with the additional security required." We have here all that the postmaster general has done and written on this subject. Take it all together and decide whether, from it, you can infer that he understood or intended not to accept this bond; for on his intention and acts it depends.

How did Mr. Bache himself understand the matter. On the 15th December, 1825, he writes: "I shall attend to the surety next week, when I hope to forward one that will meet your approbation." On the 14th April, 1828, he says: "I shall endeavour to give you a definitive answer, in the course of tomorrow or the next day, respecting my bond, after seeing my friends." Under this evidence, and the remarks I have made to aid your consideration of it, the question of acceptance is left to you. If the bond was never accepted, there is an end of the case.

II. If accepted, did the return of the bond amount to a surrender of it, to annulling, or cancelling it? This depends on the intention of it. That it was sent to Mr. Bache does not show it, but it depends on the purpose for which it was sent. If he had abused the confidence put in him, kept the bond, destroyed it, or would now turn his possession of it to a use never intended, it can avail nothing. It is of the same force and validity as if it remained with the postmaster general at Washington. There is nothing by which this intention is to be judged but the correspondence, and this makes it a question of law. It is

clear that there was no intention to cancel or annul the bond, or to substitute another, but only to strengthen the same bond by an additional surety. When such surety was procured, it was to be returned, not a new one executed. This is the language of both of the parties, clearly, and expressly. The question whether the bond was cancelled by the return of it, is different from the question, whether it was accepted or not. The argument and authorities to show that any alteration in a deed will avoid it, might have been important, if the intended addition had been made to it; but as this was not done, the bond remains now just as it was when executed, and its identity cannot be doubted. If, therefore, you shall be of opinion, that this bond was accepted, then as it is clear it never has been cancelled, it remains in full force, and the question of the liability of the defendant to all, or any part of the claim, is to be examined by you.

III. It is said that at the time this bond was executed, and long before, a large balance was due from Richard Bache to the government, and that moneys collected and paid by him, after the execution of this bond, have been applied to the payment of that antecedent balance. It is urged that this is, in effect, to charge these sureties with a default which occurred before they became so; that the moneys which should have been applied to the credit of their responsibility, have gone to the relief of sureties in an antecedent bond.

Before we examine to what extent the facts sustain this objection, we will look to the law for our guide, in deciding upon them; and this will necessarily lead us into an inquiry into the doctrine of the appropriations of payments, which seems to be well settled, and with no material variation, through a long course of decisions and years. We need not go further than to the cases decided in the Supreme Court of the United States. The general doctrine certainly is, that where a debtor makes a payment, and is indebted to the creditor on several accounts, he may direct to which debt or account, the payment shall be applied. If he gives no such direction, the

creditor receiving the money may apply it at his pleasure. If both omit it, the law will apply it according to the justice of the case. There can be no objection to this doctrine where no party is concerned but the debtor and creditor. But how is it in a case like the present? Here a public officer, in the receipt of public money, has given sureties for the faithful performance of his duties, and for the accounting for and payment of all the moneys which shall come to his hands. These sureties remain for several years, and then a new bond, with new sureties is given; at which time there is a large sum of money actually due to the public, and for which the sureties on the first bond were liable; that is to say, the penalty of the first bond was actually forfeited, and the amount of the defalcation due, and recoverable from the sureties in it. Can the government, for whose security both bonds were given, apply the moneys collected by the officer after and under the second bond, and on the responsibility of the sureties in the second bond, to the payment or credit of the balance due on moneys collected, and which ought to have been paid, by and under the first bond? Can the burden actually resting upon the first sureties; can the forfeiture actually incurred by them, be shifted by the process of appropriation, without the consent or knowledge of the second surety, from the shoulders of the first, and be put upon the second?

I am of opinion, most clearly, that it cannot; that each set of sureties must answer for its own defaults, and is entitled to be credited with its own payments. If authority can be required to sustain a principle of such obvious justice, it will be found in the case of the United States v. January, (7 Cranch, 572,) which is a much stronger case than the present. In that case a collector of revenue had given two bonds at different periods, for his official conduct; and the second bond undertook not only for the future, but also for the past fidelity of the officer. The supervisor had promised to apply all the payments he should receive to the discharge of the first bond, before he carried any of them to the credit of

the second; he keeping but one general account against the collector. At the time of the trial, the general balance against the collector was upwards of sixteen thousand dollars, but at the time when the second bond was given, it was but six thousand dollars and upwards. The payments, if all applied to the first bond, would have discharged it. The principal question in the case was, whether this promise of the supervisor was an appropriation of the money binding on the United States; without some act appropriating it, as entries in the books, for this was the question brought up from the court below. The Supreme Court first state the law on the appropriation of payments generally, as I have stated it, and then proceed in declaring their opinion, "that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is, where the receiver is a public officer not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be generally admitted," they say, "that moneys arising due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first, without manifest injury to the surety in the second bond; and, vice versa, justice between the different sureties can only be done by reference to the collector's books; and the evidence which they contain may be supported by parol testimony." How is justice to be done between the different sureties by a reference to the collector's books? Certainly by seeing when the payments were made, and applying them accordingly to the first or second bond. The reference to be made to the books is for this purpose; and not to adopt as conclusive the appropriation then made by the officer, which was contended for by the district attorney. To ascertain how far this principle will go to the relief of the defendant in this case, we must turn to the account, which is a copy from the books, and see how much of the defendant's money, if I may call it so, has been applied to the relief of the prior sureties; because

if it shall appear that the prior sureties have been paid by other moneys, in part or in whole, than those which were due and collected under the second bond; it is manifest the second sureties have no ground of complaint, further than their money has been taken for this purpose. On the other hand, there must be deducted from the final balance, now charged against the defendant, so much of the postages received since 8th July, 1825, as has been diverted from them, and applied to the first bond. This must be ascertained, as far as it can, by an examination of the account which I shall willingly refer to you; believing you will have to leave something to conjecture.

I will, however, direct your attention to some points of inquiry. The bond under which the defendant is liable, is dated on 8th July, 1825. On the supposition that it was sent at once to Washington and accepted, we may presume the contract was completed on or about 10th July, 1825, and then had reference back to the date of the bond, at which time the liability of defendant for the conduct of Mr. Bache commenced, to wit, on 8th July, 1825. It appears by the account, that on the quarter ending the 1st July, 1825, the debits against Mr. Bache exceeded his credits or payments by the sum of twenty-six thousand nine hundred and forty-nine dollars and nineteen cents. By payments made between that date and the 15th September, this balance was paid, and overpaid, leaving a balance in his favour of two thousand seven hundred and ninety-six dollars and ninety-seven cents, and had it been discharged by payments made before 1st July, the defendant would have nothing to do with it, but would have entered upon his suretyship on a clear field, and have been answerable for all subsequent delinquency. You will remark, however, that this is taking the debit to 1st July, and bringing the credits or payments to 15th September, two months and a half later. Between the postmaster general and Mr. Bache, this is of no importance; but as regards the sureties, where the inquiry is, whether these payments have been appropriated or not to their injury, the question is different. After the 1st July, and

indeed on and after the date of the bond and of the commencement of the defendant's suretyship, there were paid twenty-nine thousand seven hundred and forty-six dollars and sixteen cents. Did the whole of this consist of moneys received under the second bond? If it did, then it is a greater amount than the whole balance now due; and of course if this amount of their money has been paid to make up the deficiencies of an antecedent suretyship, and must now be restored to their credit, nothing is due from them. In other words, if the balance of twenty-six thousand nine hundred and forty-nine dollars and nineteen cents which Mr. Bache, owed on 1st July, 1825, has been paid with postages afterwards received, it is clear that if those payments had been applied to the subsequent debits of this account, nothing would be due, but there would be a balance in favour of the second bond. I mean to say, suppose the account had been closed on 1st July, 1825, Mr. Bache and his then sureties would have been debtors for twenty-six thousand nine hundred and forty-nine dollars and nineteen cents; and if a new account had been opened with the second bond, there would have been no default under it, provided the payment which, in September, 1825, extinguished the above balance, was made by moneys received for postages paid under the second bond.

This then is the matter of fact for you to ascertain from the account; how much of defendant's money has been applied to pay the antecedent debt. At the first view, we see that the whole of these payments made between 1st July and 15th September, could not have been from moneys received for postages between those periods. The payments made were twenty-nine thousand seven hundred and forty-six dollars and sixteen cents; the whole postages charged to Mr. Bache, for the quarter, from 1st July to 1st October, were seventeen thousand four hundred and fifty-six dollars and forty-nine cents; the payments, therefore, exceeded the whole receipts for the whole quarter by the sum of twelve thousand two hundred and eighty-nine dollars and sixty-seven cents,

which, therefore, Mr. Bache must have obtained either from antecedent postages not before collected and paid, or from other resources. This sum did not come from the receipts after and under the second bond, or from the funds equitably claimed by the defendant.

On this view the accounts would stand as follows:

| | |
|---|---|
| From the whole payments of - - - | $29,746,16 |
| Deduct money not under the second bond - | 12,289,67 |
| Taken of receipts under second bond - | 17,456,49 |
| Deduct probable postages from 1st July, to 8th July, belonging to first bond, say, - - | 2,000, |
| Money of second bond, applied to the first, | 15,456,49 |
| Whole deficiency now claimed - - | 22,235,50 |
| Chargeable to second bond - - - | 6,779,01 |

The principle of law is, that you shall not take the moneys due and collected subsequently to the execution of the second bond, and apply them to the discharge of the first bond; and when you have ascertained how much of the money, which became due and was collected under the second bond, has been applied to the discharge of arrears due under the first; you will deduct that amount from the whole default claimed at the conclusion of the account.

We must go one step further in this analysis. The payments stop on the 15th September, 1825, and, of course, no part of them could have been derived from postages between that date and the 1st October. If these are estimated at two thousand five hundred dollars that sum should be added to the liability of the second bond, or, which is the same thing, taken from the credit we have given to it; which would leave the sureties in this bond now chargeable with nine thousand two hundred and seventy-nine dollars and one cent; and they will then have full credit against the general balance, for all the money that was taken from them for the payment of the debt, which was due before they became sureties. Of consequence, they will

be charged with no defaults but such as occurred after their liability began, and full justice will be done to them. Indeed, if we knew certainly where Mr. Bache got the funds, with which he made the payments from the 8th July to the 15th September; that is, if we knew that all of them were derived from antecedent postages, the present sureties would be properly chargeable with the overpayment of two thousand seven hundred and ninety-six dollars and ninety-seven cents, which has gone to their credit, but came not from their funds, and belonged to the sureties of the first bond. You must not forget that justice is also due to them. A suit is now depending against them in this court; and they must answer for all that is not recoverable here. You should consider that you are settling the account between the two sets of sureties, rather than between the United States, and either of them; and your object should be to give to each bond credit for the moneys respectively due, collected, and paid under it. This is the true justice of the case. After all the payments that have been made, on closing the account, twenty-two thousand two hundred and thirty-five dollars and fifty cents are found due to the United States, from one or both of different sureties. You should give to the present defendant all the benefit of all the payments made with moneys due, collected and paid to the postmaster general under his bond; and you should, in like manner, give to the sureties in the first bond, credit for all the payments made with moneys due, collected, and paid, under their bond, and the result will show how the remaining debt should be apportioned between them.

IV. The defendant has offered another ground, which goes to the whole right of recovery. By the third section of the act of congress of March, 1825, it is enacted, "that if default shall be made by a postmaster, at any time, and the postmaster general shall fail to institute suit against such postmaster, and his sureties, for two years from and after such default shall be made, then, and in that case, the said sureties shall not be held liable to the United States, nor shall suit be instituted against them." It

is alleged, by the counsel for the defendant, that if the postmaster has been in default at the end of every quarter for two years, antecedent to the suit, the sureties are discharged; and that in this case large balances were due from the postmaster, at the end of every quarter, for more than two years before suit brought.

The district attorney contends, that at the end of various quarters, within that period, balances were in favour of the postmaster, and that this suit is not brought for any default of two years standing, but, in fact, for a default which accrued in the last quarter; all antecedent suits having been discharged by payments appropriated to them, in a manner warranted by law and usage.

I confess I cannot see any difficulty in this question. It must be borne in mind, that the right of appropriating payments stands on a very different footing here, from that which it had on the question between two sets of sureties in two different bonds. Each is liable for defaults of two distinct periods. To apply the money received, during one of these periods, to discharge a responsibility incurred in the other, is manifestly unjust, and therefore, in such case, the general right of a receiver of money, to appropriate it, when the payer does not, was restrained by the clearest principles of justice. He was bound to credit the party with the payment, who was interested in the fund from which it was derived, or he would make a surety responsible for a default for which he never undertook. But the case is altogether different where the parties interested in the payments are the same, and are equally answerable for all. In such cases the right of appropriation has been repeatedly decided and recognised in its full force and extent. By the act of congress, the sureties of a postmaster are not to be sued for a default of their principal, if the postmaster general shall fail to institute a suit for such default, for two years after it shall be made. Is this suit instituted for a default made two years before it was instituted? The suit was brought on the 1st July, 1828, to recover the sum of twenty-two thousand two hundred and thirty-five dollars and

fifty cents. Was this default made two years before; that is, on 1st July, 1826? On that day the whole amount received by Mr. Bache was seventy-five thousand three hundred and seventy-eight dollars and twenty-three cents; his payments were fifty-six thousand seven hundred and ninety-six dollars and ninety-seven cents; on that day, therefore, eighteen thousand five hundred and eighty-one dollars and twenty-six cents, was the amount of his debt or default; and if the account had then stopped, and no further payments had been made, certainly the defendant would have had the benefit of the limitation of the act. But the account goes on, debits are charged, payments are credited, the balances vary and fluctuate, sometimes being in favour of the postmaster, until at the final close he stands indebted in twenty-two thousand two hundred and thirty-five dollars and fifty cents. But it is said that this has been effected by the postmaster general, who has improperly applied the payment of moneys received after the termination of a quarter, to the balance then due; or that the moneys paid in a subsequent quarter, were applied to pay what remained due on the antecedent one. Assuredly he had a right to do so, and had he not done so, the court would have done it for him. But it is clear he has so appropriated these payments.

The case of rent is put by the district attorney. So of three promissory notes, of one hundred dollars, payable annually; no payment is made the first year; in the second year, before the second note is due, or even after, one hundred dollars are paid; so also in the third year, without any direction by the payer. The receiver applies the first payment to the first note, and the second to the second, leaving the third unsatisfied. He sues on the third note. Can the debtor say it is more than six years since the first note was due, and deny the right to apply his payments to the second and third? If there could be any doubt in a matter so plain, it is put at rest by the decision of the supreme court of the United States, in Kirkpatrick's case, (9 Wheaton, 737.) The language of the court is, "the general

doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may; if both omit it, the law will apply the payments, according to its own notions of justice. Neither party can claim the right, after the controversy has arisen; and, a fortiori, at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances otherwise adjusted than for the mere purpose of making rests, we are of opinion, that payments ought to be applied to extinguish the debts, according to the priority of time; so that the credits are to be deemed payments, pro tanto, of the debts antecedently due."

In our case the postmaster general has clearly appropriated the payments made, from time to time, by Mr. Bache, who gave no direction concerning them, but made them without any discrimination of the fund, from which they were derived, and left them to be applied, according to the pleasure of the postmaster general, and the usage of his office; and the appropriation thus made is precisely that which the supreme court has declared to be according to justice, and such as the court would direct, if neither of the parties had done so.

The application, therefore, of the moneys received in a subsequent quarter, to the payment of the debt or balance antecedently due, being perfectly correct and lawful, it follows, that no part of the default, for which suit is brought, accrued two years before; on the contrary, all the balances antecedent to the last quarter were extinguished by the successive payments, and the final debt or balance falls on the final quarter. I am entirely clear that the limitation of the time of bringing suit, provided in the third section of the act of March, 1825, cannot avail the defendant.

The case then stands before you on these points:

1. Was the bond accepted; and of this you will judge.

2. If accepted, was it afterwards cancelled, and its obligation annulled. This is matter of law; and I am of opinion it was not.

3. The moneys arising, due, and collected under the second bond, cannot be applied to the discharge of the first bond. You will ascertain how much money, if any, has been thus applied, and deduct it from the amount claimed as finally due, on the whole account.

4. The suit has been brought in good time, and is not barred by the limitation of two years in the act referred to.

The JURY found a verdict for the defendant.

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## THE POSTMASTER GENERAL OF THE UNITED STATES
## *v.*
## MATTHEW RIDGWAY AND HUGH ROSS.

1. Where a plaintiff declares against one obligor alone, as jointly and severally bound, and the defendant pleads non est factum, a joint bond of the defendant and another person is not evidence, though it agrees in date and amount with that described in the declaration.
2. An amendment of the declaration, offered after the jury is sworn, and introducing a new cause of action, cannot be allowed.
3. In an action of debt against one obligor, a declaration setting forth a joint and several bond, cannot be amended, by adding a new count, setting forth a joint bond of the defendant and another person.

ON the 8th September, 1804, Matthew Ridgway and Hugh Ross executed a joint bond, in the penal sum of five hundred dollars, to the postmaster general, conditioned for the faithful execution by Matthew Ridgway of the duties of the office of postmaster, at Milford, in Pennsylvania, and for the regular payment by him of all moneys coming to his hands for postages.

On the 31st December, 1808, his accounts were settled at the post office department, as far as they were furnished, and showed a balance to be due from him, according to his own

accounts, of eight dollars and fifty-five cents. But, besides this, he had neglected to render accounts from the 1st October, to the 31st December, 1806, and from the 1st April, 1807, to the 31st December, 1808; a period comprising twenty-four months or eight quarters, and estimated at seventy-two dollars and sixty-three cents. There was thus due and unpaid on the 31st December, 1808, a balance of eighty-one dollars and eighteen cents.

On the 22d November, 1821, this account was stated by the proper officers of the department, and was transmitted to this district, where the present suit was brought, on the 3d December, against the two defendants Matthew Ridgway and Hugh Ross. At the return day of February sessions following, the marshal returned, "Non est inventus as to Matthew Ridgway, and cepi corpus and bail bond as to Hugh Ross."

On the 12th March, 1822, the district attorney for the time being, declared against "Hugh Ross, impleaded with Matthew Ridgway, returned not found; for that whereas the said Hugh, on the 8th September, 1804, by his writing obligatory under his hand and seal acknowledged himself to be bound jointly and severally unto the postmaster general, in the sum of five hundred dollars to be paid when thereto requested, which, although often requested, he had refused to pay." To this declaration the defendant, Hugh Ross, on the 1st December, 1826, pleaded non est factum, and payment with leave, &c. The district attorney replied non solvit, and issues.

On the 24th November, 1829, the case came on for trial before Judge Hopkinson, and a special jury. It was argued by Dallas, District Attorney, for the postmaster general, and Scott, for the defendant, Hugh Ross.

After the jury were impanelled and sworn, the district attorney offered in evidence the joint bond of Ridgway and Ross, dated the 8th September, 1804, to which the counsel for the defendant objected, on the ground that the declaration only counted on "a joint and several bond of Hugh Ross," while this was a joint bond of Ridgway and Ross; a variance which

was material and fatal. Dillingham v. The United States, 2 Washington, 422.

The court sustained the objection, and overruled the evidence.

DALLAS, for the postmaster general, moved to amend the declaration, by adding a new count, in which the bond was accurately stated, and distinct breaches of the several conditions were set out.

SCOTT for the defendant.

There is no equitable reason for listening to this application to amend; and if the court have the power, it ought not to be exercised, during the trial, and under the peculiar circumstances. Twenty-one years have elapsed since this balance accrued, and eight years since the suit was instituted.

There are, however, objections strictly legal to the amendment now proposed. It is not an alteration of the existing pleadings, but it introduces an entirely new cause of action; it creates for the jury a new issue; it presents against the defendant a new substantive charge. He has pleaded non est factum; he denies that the bond stated in the declaration is his deed; that bond is described as a joint and several bond of Hugh Ross; if this amendment is allowed, it will be a joint bond of Matthew Ridgway and Hugh Ross, and of course an instrument essentially varying from that which is the subject of his plea.

It has also the effect to revive a new right of action which, as the pleadings now stand, would probably be barred; sufficient time has elapsed to afford a legal presumption of payment; and an amendment ought not to be allowed which, by introducing a cause of action not now existing on the record, might deprive the defendant of the benefit of this presumption. The thirty-second section of the act of Congress of 24th September, 1789, directs the court to amend "all imperfections, defects, and wants of form," merely, and does not extend to matters of substance, which this is, for it introduces an instrument of writing entirely different from that heretofore stated in the pleadings. 1 Story's Laws, 66. The Harmony, 1 Gal-

lison, 123. Smith v. Jackson, 1 Paine, 486. Sackett v. Thompson, 2 Johnson, 206. Harris v. Wadsworth, 3 Johnson, 257. Pease v. Morgan, 7 Johnson, 468. Petre v. Craft, 4 East, 433.

Dallas, for the postmaster general, in reply.

There is nothing to deprive the plaintiff of his right to amend. Even supposing that the statute of limitations would run against the cause of action now before the court, yet that circumstance would itself be a good reason for allowing the amendment. There is however, neither legal limitation nor legal presumption of payment. The bond was sued out in thirteen years after the default; and its identity is clearly proved by the identity of the parties, dates, and sums. Nor is the introduction of a new allegation, if this were such, into the declaration an improper amendment; such amendments have been frequently allowed. This, however, is not of that character; it is but a more definite statement, in a second count, of what has been substantially laid in the first. The issue joined is not affected; the jury have been sworn to try the issue between the plaintiff and defendant; that issue is on the plea of non est factum, which is equally applicable to either count. The substantial merits of the case ought to be submitted to the jury, which this amendment will effect; if it is refused, it will only oblige the postmaster general to begin anew, without in any manner establishing for the defendant a just and legal objection. 2 Tidd's Pr. 653. Aubeer v. Barker, 1 Wilson, 149. Blackwell v. Patton, 7 Cranch, 471. The Edward, 1 Wheaton, 264. Smith v. Barker, 3 Day, 312.

Judge Hopkinson delivered the following opinion:

This suit was brought eighteen years after the bond was executed, and fourteen years after the surety's liability by reason of the default of the principal. It is a suit on a sealed instrument, which is described by the plaintiff in his declaration, and which the defendant in his plea has alleged not to be his deed. A bond is now offered in evidence, which is not the bond so described, nor that which the defendant has denied

to be his; it is a joint bond given by himself and another person, while the former is expressly stated in the declaration to be a joint and several bond of the defendant, and it is not alleged than any other person is joined with him. It is no doubt true that amendments may be made, not only in form but even in substance. But surely the court is not to be put to sea; nor is this privilege to be so construed as to introduce suddenly, and on the trial, new parties and a new cause of action. My difficulty is, that the proposed amendment would introduce an entirely new cause of action. The bond as set forth in the new count, now offered as an amendment, differs in the most essential particulars from that originally declared on, as it is described in the declaration. It is impossible for us to decide that they are the same instruments, merely from similarity in certain particulars. The same parties may, on the same day and in the same penalty, have given a joint and several bond, as well as a joint bond. What are pleadings? They are the manner and form in which a party is required to present his case to the court, and if he has made a mistake in this form, which is peculiarly under the direction of the court, he may be allowed to amend it. But here there is no error in the manner and form of stating the plaintiff's case, but in the case itself. He has mistaken his cause of action. He has brought the defendant here to answer his complaint; he has formally stated and declared what that complaint is; the defendant has put in his answer to it; and the parties appear, each to maintain his allegation. But now the plaintiff informs the court that he has no such complaint as he has averred; although he has another which he prays may be substituted for that which he cannot maintain.

On the whole I am of opinion that the amendment ought not to be now made; and on the ground that it introduces a new cause of action.

A NONSUIT was entered, with the assent of the district attorney.

## JOHN SNELL AND JOEL A. BAKER
## v.
## THE BRIG INDEPENDENCE.

1. To subject a seaman to the forfeiture of his wages, for absence, according to the provisions of the act of 20th July, 1790, an entry of the fact must have been made in the log book, by the mate, stating the name of the seaman, the date of the absence, and that it was without leave of the master.
2. A seaman who returns to a vessel, after a week's absence without leave, and continues during the rest of the voyage, is to receive his wages at the rate originally contracted for, in the shipping articles, unless a new contract is explicitly made.
3. The charge for a person necessarily employed in the place of a seaman, absent without leave, is to be deducted from his wages.
4. The police costs and charges incurred by a seaman, for improper conduct while on shore, are to be deducted from his wages.
5. Where a vessel is detained by the refusal of the seamen to work, they are to be charged with the demurrage, and the proportion of each seaman who refused is to be deducted from his wages.

ON the 8th January, 1830, this case was argued by GRINNELL for the libellants, and J. R. INGERSOLL for the respondent.

Judge HOPKINSON delivered the following opinion:

The libellant, Baker, shipped on board the brig Independence, at Philadelphia, on the 9th April, 1828, and proceeded in her from Philadelphia to Gibraltar, thence to Pernambuco, thence to Trieste, thence to Swinemunde, thence to Bourdeaux, and thence back to Philadelphia, at fifteen dollars a month.

The libellant, Snell, states that he shipped on board the said brig at Trieste, on the 14th May, 1829, to perform a voyage from Trieste to Swinemunde, and elsewhere, and thence to Philadelphia, at eight dollars a month. He says that he proceeded on the said voyage from Trieste to Swinemunde, thence to Bourdeaux, and thence to Philadelphia, where the said brig arrived, on the 27th November, 1829. Annexed to the libel is an account stated by Snell, in which he charges the brig with

wages, from the 14th May to the 27th November, 1829, at eight dollars, amounting to fifty-one dollars and forty-seven cents, and allows sundry credits to the amount of twenty-two dollars and seventeen cents, leaving a balance in his favour of twenty-nine dollars and thirty cents.

Baker also annexes an account, in which he charges the brig with wages, to the amount of two hundred and ninety-four dollars, and allows credits for ninety-eight dollars and sixty cents, leaving a balance in his favour of one hundred and ninety-five dollars and forty cents.

The master of the brig, William Fennel, has filed an answer to these claims, in which he admits that the libellants shipped for the voyage, and at the rates of wages they have respectively set forth; but he denies that they faithfully performed their duty. On the contrary, he charges that their conduct was highly disobedient, refractory, and mutinous; that Baker, without authority, and against all order, twice ran away from the brig, while lying at Gibraltar; on one occasion, taking with him the boat of the brig, and on another, making his escape from confinement, to which he had been subjected in consequence of his first absconding. That while at Pernambuco, being drunk, he used gross and insulting language to the captain, and voluntarily jumped overboard and swam to the reef. That while at Trieste, he deserted from the brig, and abandoned his duty, of which an entry was made in the log book, in these words: "Monday, April 27th, 1829, John Bates," (agreed to mean the libellant, Baker,) "one of the men, off his duty." That while at Swinemunde, he frequently went on shore without leave, and contrary to express orders; and that on one occasion, both Baker and Snell, so being on shore without license, conducted themselves in so disorderly and riotous a manner, that they were placed under arrest by the civil authorities of Swinemunde, and imprisoned, the expenses of which, and of hands employed in their absence, the respondent was compelled to pay. The respondent further answers, that while at Elsinore, and the wind fair to get under way, the libellants, in disobe-

dience of orders, refused to heave the anchor, or to perform duty; that, in defiance of all authority, they mutinously persisted in their resolution; and that Baker raised a handspike against the respondent. That, by reason of this mutiny, the favourable moment was lost, and the brig detained for some time at Elsinore, by contrary winds, subjecting the respondent to a heavy charge of demurrage. The respondent denies that the libellants are entitled to any of the wages claimed by them; but, on the contrary, are severally indebted to the brig,

An account is annexed to this answer, by which it appears there were due to Baker, on the 27th April, 1829, the day of his alleged desertion, eighty-one dollars and three cents; which the respondent contends was wholly forfeited by his desertion. In this account Baker is charged only with cash paid to him, or for him. It then credits him with wages, at eight dollars a month, from the 5th May to the 27th November, 1829, amounting in the whole to fifty-three dollars and eighty-seven cents, and charges him with various items, during that time, amounting to eighty-four dollars and forty-three cents, leaving a balance against him of thirty dollars and fifty-six cents.

The facts stated in the answer are substantially proved by the deposition of John Smith, the first mate of the brig; and the truth of them has not been materially controverted. An additional fact appears by this testimony, corroborated by a writing given by Baker; it is, that while he was absent from the brig, at Trieste, he became indebted to one John Wilkinson in the sum of twenty-four dollars, which Baker, by the writing, agreed should be deducted from his wages, afterwards to be earned.

The charges of misconduct made against Baker are supported by the evidence of the mate, and have not been disproved by any evidence on the part of the libellant; indeed, he has produced no testimony whatever. The argument has turned on the consequences of his misbehaviour, in the several instances mentioned; and whether or not, they, or any of them, have worked a forfeiture of his wages, or what amount of compensation may be taken from his wages to answer them.

The credits allowed to the ship, by Baker, are given in gross, amounting to ninety-eight dollars and sixty cents, including the hospital duty, which account he states only on his recollection. The total charges against him, in the captain's account, independent of the claims made for his misconduct, amount to one hundred and thirty-two dollars and eighty-three cents, and seem not to be questioned. The cash payments, therefore, charged to Baker, are presumed to be correct.

By taking the allowances claimed by the master as forfeitures, or deductions of wages, more or less, and disposing of them in their order of time, we shall come, in the most plain and satisfactory way, to the result. At Gibraltar, Baker appears to have conducted himself with great insubordination, leaving the vessel with an evident intention of deserting her. He was, however, brought back, and punished, by confinement in irons. He is not entered by name in the log book for this offence; nor has the captain in his account made any charge against him for any loss or expense incurred by it. The same may be said of his insulting violence when drunk at Pernambuco, when he jumped overboard and swam to a reef, but was brought back and returned to his duty, which he performed without complaint, until the arrival of the brig at Trieste. The real matters in controversy began there. Every thing up to that time seems to have been settled by punishment or forgiveness.

On the 27th April, 1829, at Trieste, Baker went on shore, and did not return until the 5th May; and this absence is asserted to have been without leave, and to have incurred a forfeiture of all the wages due at that time. Was this absence without the leave of the officer commanding the vessel? It is no where said so, either in the log book, or by the mate in his examination at this trial. That witness says that "on the 26th April, Baker went on shore with his permission, that he returned, and said he had gone to ask his discharge from the captain, who said he had no objection if the consul was willing; he went on shore again, and did not return until the 5th May." There is no di-

rect allegation that this going on shore, which is the one relied upon for the forfeiture, was without leave.

But if it might be inferred from the evidence of the mate, and the circumstances, is it sufficient? I think not. The act of congress of 20th July, 1790, (1 Story's Laws, 104,) gives great advantages to the owner of a vessel in making his log book the evidence of a fact, which acquits him altogether of a debt; and courts have very properly held him strictly to the proof required. The truth is, it is a highly penal act. We must not look at a forfeiture of a seaman's wages, with regard merely to the amount due to him, which is generally small, but consider it rather as his all; as the sole fruit of long, laborious, and dangerous services; as the essential means of procuring for him the necessaries and comforts of life, while on shore, and, it may be, in sickness, or with a family depending upon it for their bread. Seamen, as a class of men, are entitled to receive peculiar indulgence. Their character, their education, the very nature of their employment, engender habits of recklessness and occasional violence, which other persons are not exposed to; much of their merit and usefulness is connected with their faults, and even with their vices.

When the master of a vessel intends to insist on the forfeiture of a seaman's wages, for a desertion for more than forty-eight hours, it is required that the absence shall be without leave of the master; and that the mate shall make an entry in the log book of the name of the seaman, on the day on which he shall absent himself. The entry must contain all that is necessary to incur the forfeiture. Of this, nothing is more essential than that the absence was without leave of the commanding officer of the vessel. The law is settled by several decisions, that it is not sufficient to state in the log book that the seaman was absent; but it must also be stated, whether it was with, or without leave; stating that the seaman left the ship is not sufficient. In this case the entry is no more than that the libellant was "off duty;" but where, whether in the ship, or on shore, and where-

fore; whether with, or without leave, whether on account of sickness, or other justifiable cause, does not appear. As a proper entry in the log book is indispensable evidence of a desertion, for which a forfeiture of wages is claimed, and as no such entry was here made, the forfeiture cannot be ordered.

On the 5th May, at Trieste, Baker returned to the brig, after an absence of a week, and performed duty as a seaman. Another question here has been controverted by the parties. The master insists that he came on a new contract, and is entitled from that day to wages only at the rate of eight dollars a month, the amount given to other seamen at Trieste. This pretence is founded on the evidence of the mate, that the captain ordered him to tell Baker that he was no longer on wages, and he did so. But can this be sufficient to annul the original contract, by the shipping articles; and to make a new implied contract in the place of it? When this was told to Baker does not clearly appear, and no assent to it on his part is pretended. No new contract was formally made in the shipping articles; nor any entry made on them, or elsewhere, of the cancelling of Baker's original contract. It therefore stands now, as it did in the beginning. It would be too much to destroy it, and set up another on such evidence as is here produced. The mate does not insinuate that any new contract was made for eight dollars a month, or any other sum; and if wages had happened to be twenty dollars a month at Trieste, we cannot believe the master would have thought Baker entitled to them, on what is testified by the mate. The answer expressly admits that the libellants shipped for the voyage, and at the rate of wages set forth in the libel; and no other contract is averred or put in issue by the answer. I must, therefore, consider Baker as returning to the brig on his first contract; the only one ever made between him and the master of the vessel.

The charge of one dollar and fifty cents, for a man hired in Baker's place, is a proper charge. So also, the charge of four dollars and eighty cents for cash paid the police officers and prison expenses at Swinemunde.

Baker is charged with twenty dollars, as his one third part of the demurrage, for detaining the brig two days at Elsinore; where, when the vessel was ready to sail, the mate says, "the men refused to heave the anchor," Baker being one of them. In his cross examination the mate speaks generally of the crew being guilty of this disobedience. In his deposition he designates by name, only Baker and Snell. In the log book the name of a third seaman is introduced. The master, in his account, has divided the demurrage among the three, charging the present libellants, Baker and Snell each with one third. I wish the mate had been more explicit on this subject; but I do not think his expressions of the men and the crew, necessarily embrace every individual on board in that capacity. Certainly both Baker and Snell were prominent in this, as in other scenes of misconduct, and no injustice is done to them in the charge made on this account.

Baker is also chargeable with the twenty-four dollars which he ordered to be paid for him to John Wilkinson at Trieste.

Baker's account settled on these principles will stand;

| | | |
|---|---|---|
| Dr. Wages from 9th April, 1828, to 27th November, 1829, at $15, - - - - - | | $294 00 |
| Cr. By cash payments, as per account, | $132 83 | |
| Charges allowed against him, - | 51 13 | |
| | | 183 96 |
| Amount due to Baker, - - - - | | 110 04 |

To Snell there is nothing due.

Decree. That Joel A. Baker recover the sum of one hundred and ten dollars and four cents, and that the libel of John Snell be dismissed.

## George H. Douglass
## v.
## Franklin Eyre, Owner of the Brigantine Independence.

1. The word 'or' has sometimes been construed to mean 'and,' when such construction has been clearly necessary to give effect to a clause in a will, or to some legislative provision, but never to change a contract at pleasure.
2. Shipping articles for a voyage 'from Philadelphia to Gibraltar, other ports in Europe, or South America, and back to Philadelphia,' authorise a voyage directly from Gibraltar to South America, without proceeding to any intermediate European port, but not a return afterwards from there to a European port.
3. A change of a voyage from that specified in the shipping articles, must be actually resolved on and known to a seaman, to authorise him to leave a vessel without forfeiting his wages.
4. An entry in the log book is prima facia evidence of its truth in every particular, and to be falsified, must be disproved by satisfactory evidence.

On the 8th January, 1830, this case was argued by Grinnell, for the libellant, and J. R. Ingersoll, for the respondent.

Judge Hopkinson delivered the following opinion:

The libellant states that on the 9th April, 1828, he shipped as second mate on board of the brig Independence, then owned by Franklin Eyre, at the wages of thirteen dollars a month, on a voyage from the port of Philadelphia to Gibraltar, thence to a port or ports in Europe, or to a port in the Brazils, and thence back to the said port of Philadelphia. The libellant avers that he proceeded in the brig, on the said voyage, to Gibraltar, and thence to Pernambuco, faithfully performing his duty until the time of his leaving the brig. He continued on board the brig at Pernambuco until the 31st October, 1828, when he left her; the voyage for which he shipped, being changed, and the said brig ordered for the port of Trieste, for which she afterwards sailed, as the libellant has heard and believes. He avers that when he left the brig, there was

due to him for wages as aforesaid ninety-four dollars and seventy-two cents. He further states that he left Pernambuco on or about the 30th November, 1828, and arrived at New York on the 30th December, 1828, and at Philadelphia on the 31st. The libel was filed on the 16th April, 1829.

The voyage described in the articles is "from Philadelphia to Gibraltar, other ports in Europe, or South America, and back to Philadelphia." The first question arises on the true construction and meaning of this part of the contract.

The libellant contends that the vessel should have returned directly from Gibraltar to Philadelphia, or should have gone from Gibraltar to other port or ports in Europe, and thence back to Philadelphia; but had no right to go to South America. I can see no reason to justify this construction. It would be entirely to erase or reject from the articles, the words, "or South America." Whether, if after leaving Gibraltar she had gone to another port in Europe, she could afterwards have proceeded to South America, is another question which does not occur, as she went directly from Gibraltar to Pernambuco.

On the other hand, it is contended by the respondent, that, under these articles, the brig, after leaving Gibraltar, had full liberty to go to other ports in Europe, and then to South America, or to go first to South America and back to ports in Europe, terminating the voyage at Philadelphia. To maintain this construction, it is necessary to change one word in the contract, or at least to change its ordinary signification; that is, to construe the word 'or' to mean 'and.' Cases have been alluded to, in which this has been done. 'Or' is a disjunctive particle; in its ordinary signification it corresponds to 'either,' meaning one or the other of two, but not both. If this meaning be taken from it, I know of no other word in our language to supply it. It is true that this word has sometimes been construed to mean 'and,' when this was clearly necessary to give effect to some clause in a will, or some legislative provision. In such cases it has been forced out of its proper meaning to effect these purposes; but never to change a

contract at pleasure. Indeed it seems to be an inaccurate expression to say that 'or' can ever mean 'and.' It should rather be said, that, for strong reasons, and in conformity with a clear intention, 'or' has been changed or removed, and 'and' substituted in its place.

I do not agree with the respondent in his construction of the description of the voyage in these articles. I understand them to mean, that the brig was to sail from Philadelphia to Gibraltar; when there, the captain had his option to go to other ports in Europe, and return to Philadelphia; or to go to South America, and from thence to return to Philadelphia; but having made his election he is bound by it; that is, if from Gibraltar he had gone to another port in Europe, he could not afterwards have gone to South America; or having made his choice to go from Gibraltar to South America, he had surrendered his right to go again to Europe, and was bound to return from South America to Philadelphia. Whether he might have visited other, and how many ports in South America besides Pernambuco, it is not necessary to inquire.

The contract of the parties being thus settled, we proceed to the facts of the case, out of which the controversy has arisen.

When this brig sailed from Philadelphia, her master was Joseph M. Douglass, the brother of the libellant. The brig remained but two or three weeks at Gibraltar. She sailed from thence for Pernambuco, where she arrived on the 1st July. From some causes of discontent, not fully explained, nor material, her master left her about the last of August. Her command or direction was assumed by the supercargo, William Fennell. She remained at Pernambuco until the 29th January, 1829, when she sailed for Trieste. On the 31st October, 1828, the libellant left the vessel, without the leave and against the orders of her officer; he remained at Pernambuco, without returning to the vessel for about a month; he then sailed for New York. The following entry is made in the log book; "31st October, 1828, George Douglass left the brig of his own accord," which the counsel for the libellant

admits is a sufficient averment that he left the brig without the leave of the master.

This desertion of the brig by the libellant, and abandonment of his duty, are relied upon by the respondent as forfeiting all the wages then due, and two questions have been made in the case. 1. Whether such a justification is shown by the libellant for leaving the brig as saves the forfeiture and entitles him to his wages. 2. Whether the proof offered of the desertion is sufficient, under the act of congress, to give the respondent the benefit of it.

The justification set forth by the libellant, in the libel, is stated thus; that "he continued on board the said brigantine, at the port of Pernambuco, till the 31st October, in the year aforesaid, when the libellant left the said brigantine, the voyage for which the libellant shipped being changed, and the said brigantine ordered for the port of Trieste." This is the allegation; but how is the proof? Is it true that on the 31st October the voyage was changed, and the brig ordered for Trieste? The very reverse of this is proved by two uncontradicted witnesses. No determination to go to Trieste was made until about the 1st January, 1829; nor was the voyage changed until the 29th January, when the brig sailed for that port. It is therefore impossible to doubt that this justification is a mere after thought, untrue in point of fact, when the libellant left the vessel, and forming no part of his reason or motive for abandoning his duty.

He has endeavoured to prove some rumours on shore, that the vessel was going to Trieste, and some absurd talk on board the brig, that she was going to Jerusalem; but there was nothing in the proceedings, the orders, or the declarations of any of the officers of the vessel, to countenance the pretence. When Douglass left the brig, she had no cargo in; but on that day took a few barrels of sugar on board. If a seaman is to be justified in leaving his ship and his duty, in a foreign port, on such pretences and rumours, they will never be wanting. He made no inquiries of the officers respecting these reports or their intentions.

The sincerity of this excuse is wholly destroyed by the testimony of the libellant's own witnesses. They have testified that two or three weeks after the libellant's brother, who had been the master, left the brig, they heard libellant talk of leaving her. He gave no reason, but that he did not like the living on board. This was before the rumour of a change of the voyage, which came from two foreign seamen who had been shipped. Again; the libellant made repeated applications to William Fennell for a discharge, sometimes in a rude and insolent manner, as if he would provoke him to it, but never mentioning the change of the voyage as his reason. In short, he left Pernambuco, after loitering there for a month, several weeks before any intention was taken or manifested to go to Trieste, and while it was altogether uncertain whether she would not come directly to Philadelphia from Pernambuco. Surely the brig had a right to his services while she remained at Pernambuco, and it was time enough for him to leave her, and claim his discharge, when she was about to sail for an unauthorised port.

He arrived at this port in December, 1828, and made no claim upon the owner, who resided here, for wages, under an apparent consciousness that he had forfeited them. In April, however, when he may have heard the brig had actually gone from South America to Trieste, he files his libel, and sets up this change of the voyage as the justification of his desertion, and to relieve himself from the consequent forfeiture of his wages.

I think the libellant has wholly failed in justifying his desertion of the brig at Pernambuco, and that he has thereby forfeited his wages, provided the proof of his desertion has been made out in the manner required by the act of congress. By the fifth section of the act of 20th July, 1790, (1 Story's Laws, 104,) it is enacted, that if any seaman "shall absent himself from on board the ship or vessel, in which he shall have shipped, without leave of the master, or officer commanding on board; and the mate, or other officer having charge of the log book, shall make an entry therein of the name of such seaman or mariner,

on the day on which he shall so absent himself; and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels on board the said ship or vessel."

The objection made to the sufficiency of the proof in this case, is, that the entry was not made on the day on which the libellant absented himself. I have found no direct decision of this question, that is, whether, under all circumstances, the entry must be made on the day the seaman leaves the vessel. Certainly much inconvenience may be foreseen from a rigid and literal adherence to the words of the act in this particular; in some circumstances it would be impossible. No case has been produced to support it, and the reasons given for requiring the entry at all, do not require this strict interpretation. An entry in the log book is in dispensable evidence of the fact of desertion when a forfeiture is insisted upon. It is necessary in order to show that no release was intended, by receiving the delinquent again on board, as well as to ascertain the fact with greater accuracy. This is the language of the late Judge Peters, in the case of Malone v. The Mary, (1 Peters Ad. Dec. 140;)

In the case of the Phœbe v. Dignum, (1 Washington, 48,) Judge Washington says that an absence, for more than forty-eight hours, without leave, is a forfeiture of wages, "provided the officer having charge of the log book shall make an entry therein, of the name of such seaman, on the day on which he shall so absent himself. The reason of this is obvious. If such entry be made, it repels any presumption that such consent took place, or that the forfeiture was intended to be waived. If no such entry be made, it is to be presumed that the absence was not injurious, and was not objected to." When the judge says the entry is to be made, "on the day," the seaman absents himself, he merely recites the words of the act, but does not give any

interpretation of them on the point now in issue; nor was it necessary he should, for in the case before him no entry whatever had been made.

Nor do I find myself under the necessity of deciding this question. The evidence of the case makes it sufficiently satisfactory to my judgment, that the entry was duly made, and in conformity with the words of the act. The first evidence is the log book itself. The entry in question purports to be made on the day of the transaction; and it is fair, without any appearance of alteration, obliteration, or falsehood. The entries, before and after this one, all appear in regular order according to their dates; and they must also be false as to the time of making them, if this is.

We agree, however, that although the entry in the log book is indispensable evidence under the act of Congress, it is not conclusive, and may be disproved by other testimony. Has this been done in this case? John Smith, the first mate of the brig, says that he made this entry, and kept the book; that it was his duty to take notice of it, when any man left the vessel; that it was his usage to make the entries of every day on the days they bear date, unless prevented by some extraordinary circumstances, in which cases they were sometimes made one or two days after. On being very closely pressed, he did say, that he could not say positively whether this entry was made on the day or not; but, in the beginning of his evidence, he distinctly said that he believed the entry was made at the time it bears date. We know that the vessel was lying quietly in port, with no press of business on the mate, nor any extraordinary circumstance that should have compelled or induced him to depart from his custom of making his entries every day. Why then should we not presume it to have been done?

But I hold the entry itself to be prima facie evidence of its truth in every particular; and to be falsified it must be disproved by satisfactory evidence. There is no such evidence here. The mate speaks with the caution a conscientious witness

would use, about a fact which occurred more than a year ago; and about which there could not be an absolute, infallible certainty. The log book is so far from being disproved by his evidence, that it receives a reasonable confirmation from it.

Upon the whole, it is my opinion, that the libellant has forfeited his wages by his desertion from the brig at Pernambuco; and that the desertion has been fully proved according to the provisions of the act of Congress.

DECREE. That the libel be dismissed with costs.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

FEBRUARY SESSIONS, 1830.

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THE UNITED STATES OF AMERICA

*v.*

WILLIAM BROWN ADMINISTRATOR OF ROBERT BROWN, DECEASED.

1. If a bond be taken at common law, with a condition in part good and in part bad, a recovery may be had on it, for a breach of the good part.
2. If a bond be taken under a statute, with a condition in part prescribed by the statute, and in part not prescribed by it, yet if it be easily divisible, a recovery may be had on it, for a breach of the part prescribed by the statute.
3. If a bond be taken under a statute, declaring that it shall be in a prescribed form and in no other, a recovery cannot be had, if it varies from the statute, or *if the* condition contains more than the statute requires.
4. A retrospective condition in a statutory bond is void.
5. The twenty-third second of the act of 9th January, 1815, which requires a collector of internal revenue to give bond, with condition for the true and faithful discharge of the duties of his office, does not authorise a bond, with condition that the collector has truly and faithfully discharged such duties.
6. In a suit against a surety of a collector of internal revenue, upon a joint and several bond, with condition that the collector has truly and faithfully discharged his duties, and also with condition that he will truly and faithfully discharge them, a recovery may be had against the surety for a breach, by the collector, of the latter condition.

ON the 22d July, 1813, an act of Congress was passed for the assessment and collection of direct taxes and internal duties, by which various collection districts were established in each state. The eighth district of Pennsylvania comprised the coun-

ties of Northampton and Wayne. One collector was to be appointed by the president for each district, who was to be a respectable freeholder and reside within the same. He was required before receiving from the assessors the lists of taxes and taxables, to "give bond with one or more sufficient sureties, to be approved by the comptroller of the treasury, in at least double the amount of the taxes assessed in the collection district, for which he was appointed; which bond was to be payable to the United States, with condition for the true and faithful discharge of the duties of his office, according to law, and particularly for the due collection and payment of all moneys assessed upon such district; and the said bond was to be transmitted to and deposited in the office of the comptroller of the treasury." He was required to pay over to the treasury, quarterly, or sooner if required by the secretary, the moneys collected, and to render a final account within six months after receiving the lists from the assessor; and, in case of failure to do so, the comptroller was authorised to issue a warrant of distress against him and his sureties, their persons, chattels, and real estate. 2 Story's Laws, 1320. 1324. 1330.

On the 2d August, 1813, an act of Congress was passed, laying a direct tax, by which the sum of thirteen thousand seven hundred and eighty dollars was fixed as the quota of the counties of Northampton and Wayne, in Pennsylvania. 2 Story's Laws, 1358.

On the 5th January, 1814, the president of the United States, appointed Nicholas Kern, of Northampton county, collector of direct taxes, for the eighth collection district of Pennsylvania.

On the 13th January, 1814, Nicholas Kern, with Jacob Weygandt and Christian Bixler as his sureties, gave bond to the United States of America, in the penal sum of twenty-seven thousand five hundred and sixty dollars, with the following condition; "Now, therefore, if the aforesaid Nicholas Kern, has truly and faithfully discharged, and shall continue truly and faithfully to discharge the duties of said office, according to law; and shall particularly, faithfully collect and pay accord-

ing to law, all moneys assessed upon such district, then the above obligation shall be void, and of none effect, otherwise it shall abide and remain in full force and virtue."

On the 18th May, 1814, this bond was transmitted to the comptroller of the treasury, and the sureties were approved by him.

On the 9th January, 1815, an act of Congress, was passed to repeal the act of the 22d July, 1813, "except so far as the same respected the collection districts thereby established, internal duties, and the appointment and qualifications of the collectors and principal assessors, thereby authorised and required." It also provides, that "each collector before receiving any list as aforesaid for collection, shall give bond with one or more sufficient sureties, to be approved by the comptroller, in the amount of the taxes assessed in the collection district, for which he has been or may be appointed, which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office, according to law, and particularly for the due collection and payment of all moneys assessed upon each district; and the said bond shall be transmitted to and deposited in the office of the comptroller of the treasury. Provided, nothing herein contained shall be deemed to annul, or in any wise to impair, the obligation of the bond heretofore given by any collector; but the same shall be and remain in full force and virtue, any thing in this act, to the contrary thereof, in any wise notwithstanding." It contained also similar provisions to the preceding act, for paying over moneys collected and rendering accounts, and for proceedings in case of failure. 2 Story's Laws, 1452. 1461. 1465.

By the same act the quota of Pennsylvania was increased to double the amount, fixed by the preceding one. 2 Story's Laws, 1451.

On the 19th April, 1816, an act of Congress was passed for laying duties on licenses to distillers, requiring them to deliver a bond to the collector of the district, for payment of duties every twelve months; and it was made the duty of the

collector to collect the duties and prosecute for their recovery. 3 Story's Laws, 1569. 1572.

On the 17th October, 1816, Nicholas Kern, with Robert Brown and Jacob Driesbach as his sureties, gave a second bond to the United States of America, in the penal sum of forty-five thousand dollars, with the following condition; "Now therefore, if the aforesaid Nicholas Kern has truly and faithfully discharged, and shall continue truly and faithfully to discharge, the duties of said office, according to law, and shall, particularly, faithfully collect and pay according to law, all moneys assessed upon such district, then the above obligation shall be void and of no effect, otherwise it shall remain in full force and virtue."

On the 11th January, 1817, this bond was transmitted to the comptroller of the treasury, and the sureties were approved by him.

Nicholas Kern continued to act as collector until the close of the year 1825. On the 14th December, in that year, a settlement of his accounts took place at the treasury, and a balance appeared against him of eighteen thousand nine hundred and thirty-nine dollars and eighty-six cents.

A transcript of the accounts and the two bonds were transmitted to the Eastern District of Pennsylvania, and suits were commenced against the principal and sureties in both bonds, in the year 1826.

The present defendant is the administrator of Robert Brown, one of the sureties in the bond of the 17th October, 1816.

The declaration, which was in debt on this bond, contains two counts. The first proceeds for the penalty without setting out the condition or any breach of it. The second sets out the condition of the bond and assigns two breaches of it; the first assignment of a breach is a general one declaring, that after the execution of the bond, Nicholas Kern did not truly and faithfully discharge his official duties, nor faithfully collect and pay according to law, all moneys assessed upon his district; the second assignment of a breach is more special and comprises

two allegations, the one that he did not pay fifty-one dollars and ninety-nine cents, cash received by him as collector after the execution of the bond, the other that he did not collect and pay eighteen thousand eight hundred and eighty-seven dollars and eighty-seven cents, due on uncollected bonds taken by him as collector, to wit, on the 1st January, 1817.

To this declaration seven pleas and a special demurrer are filed, on six of which there is a joinder of issue as to matters of fact. The remaining plea is the fourth.

The fourth is a plea in bar, containing averments of the original appointment of Nicholas Kern, and his commission, on the 5th January, 1814; that he exercised the office thenceforward till the date of this bond of the 17th October, 1816; that this bond was prescribed by the act of 9th January, 1815, and was required and taken under colour of it; that its condition varies from the one prescribed by that act in providing that Nicholas Kern, "had truly discharged the duties of his office," previously to the execution of the bond; and that therefore, the "writing brought into court," and on which the suit is brought is void.

The special demurrer is to so much of the second count of the declaration as alleges a breach of condition on the part of defendant Nicholas Kern, in not collecting and paying the eighteen thousand eight hundred and eighty-seven dollars and eighty-seven cents, due on uncollected bonds taken by him, on the ground that the nature and circumstances of the uncollected bonds, and the time they were taken, or became due, are not set forth.

To the fourth plea the United States demurred and the defendant joined in demurrer. The United States also joined in the special demurrer of the defendant.

The demurrers were argued on the 19th March, 1830, by Dallas, District Attorney, for the United States, and by Binney and Chauncey, for the defendant.

Dallas, for the United States.

In order correctly to understand this case, there must be a full reference to the acts of congress, under which Nicholas

Kern was appointed a collector of the direct taxes and internal duties for the eighth district of Pennsylvania, as well as to the pleadings in this action.

Upon the fourth plea the broad question comes up. It is asserted, on the part of the defendants, that the bond on which the suit is brought does not conform to the act of congress, under which it purports to have been made, but is contrary thereto; that it is therefore void in law, having a retrospective clause in the condition, not warranted by the act of congress, to wit, that the said Nicholas Kern 'has' truly and faithfully discharged his duties.

In answer to this objection, it is contended that the bond is good, so far as it constitutes the foundation of the demand in this suit. The declaration does not, in assigning a breach of the bond, refer to any part of the condition not prescribed by the act of congress. In setting forth the breach there is no retrospect, nor any demand made for any thing done by the collector antecedent to the bond. Utile per inutile non vitiatur. The excess in the condition is neither malum in se, nor malum prohibitum. Although the bond be taken under the statute, it is also, in its nature, a voluntary bond. It is not like a bond exacted by compulsion of law, in the course of a judicial proceeding, nor like an embargo bond, which the party gives to enjoy a particular advantage. We sue for nothing but what is contained in the act of congress, and has the assent of both parties. The law may discriminate between the good and bad parts of a bond, unless the statute is express that it shall be void. 3 Story's Laws, 1568. Shepherd's Touch. 371. 1 Fonblanque Eq. 212. Buller's Ni. Pri. 171. Pigot's case, 11 Coke, 27. Norton v. Simmes, Hobart, 13. Butler v. Wigge, 1 Saunders, 65. Arlington v. Merricke, 2 Saunders, 410. Shum v. Farrington, 1 Bos. & Pull. 640. Barton v. Webb, 8 Durn. & East, 459. Newman v. Newman, 4 Maul. & Sel. 70. United States v. Smith, 2 Hall's Law Journ. 456. Armstrong v. United States, Peters C. C. Rep. 46. United States v. Howell, 4 Washington, 620. United States v. Sawyer, 1 Gallison, 99. Bolton v. Robinson, 13 Serg. & Raw. 195. Postmaster General

v. Cochran, 2 Johnson, 415. Vail v. Lewis, 4 Johnson, 450. Hughes v. Smith, 5 Johnson, 168. Morse v. Hodgson, 5 Mass. Rep. 314. Clap v. Guild, 8 Mass. Rep. 153. Purple v. Purple, 5 Pickering, 226. Washington v. Smith, 3 Call, 13. Johnston v. Meriwether, 3 Call, 523.

Binney and Chauncey for defendant.

Has this bond a legal validity? The first count of the declaration is general, and the plea is performance generally. The second count sets out the alleged breaches; to this there are pleas, and demurrer. This goes back to all the proceedings anterior to the demurrer, and we are to inquire where is the first fault. If the plea be insufficient, and the matter in it not such as will warrant a judgment for the defendant, yet if the declaration be bad, setting out no good cause of action, judgment must be for the defendant. If, therefore, either the plea or the declaration is for the defendant, he will be entitled to judgment.

I. As to the plea. It is admitted that the sureties are not answerable for any thing before the bond. The declaration should inform the defendant what it is he is to answer; yet the second count in fact shows no breach at all. It contains only a general allegation, that the defendant has not performed, but does not distinctly set out a particular breach. The first part, or general averment, is but introductory to the breaches afterwards set out. The breaches, as assigned, are two; yet there is no averment that the fifty-one dollars and ninety-nine cents were collected from the district of the collector, or ought to be paid to the United States; and as to the "uncollected bonds," what bonds are referred to? All this should have been set out, to show whether or not they came under the first bond, given by Kern in 1814, pursuant to the act of 22d July, 1813, (2 Story's Laws, 1445,) because the bond of 1814 is to answer for such uncollected bonds. It is not averred that it was his duty, as collector, to collect these bonds; they may or may not have related to his office. The questions therefore are, is the breach set out with certainty? If certain, is the breach one within the bond? 1 Chitty Plead. 326, 328.

II. As to the validity of the bond. This is not a voluntary bond. The pleadings agree that a bond was required by the statute. The act of congress does not authorise this bond. The act is clearly prospective. This is not the case of a bond to do acts which will violate some law, yet which has other conditions that are lawful; nor is it to do an act which any statute prohibits.

The question is, whether, where a bond is authorised by a statute, and it is taken, not according to the statute, it is not void. The officer taking the bond has done that which is not according to his authority, but is substantially different from it. Is it good for any thing? If a statutory authority may be exceeded, and is nevertheless good for all but the excess, how can we avoid oppression? The authority must be strictly, or at least in substance, pursued. Affirmative words in a statute contain or imply a negative; that it shall be done in no other manner. If the bond is void, it cannot be helped by alleging only such a violation as is within the lawful part of the condition. The question is not upon the condition, but the bond. The bond is one and indivisible; the penalty cannot be divided. Jenkins Cent. 135, pl. 76. Buller's Ni. Pri. 172. Chitty's Plead. 326. Dive v. Maningham, Plowden, 63. Townsend's case, Plowden, 113. Stradling v. Morgan, Plowden, 206. Lee v. Coleshill, Croke Eliz. 529. Norton v. Simmes, Moore, 856. Slade v. Drake, Hobart, 298. Wethin v. Baldwin, Siderfin, 55. Rex v. Croke, Cowper, 29. Thatcher v. Powell, 6 Wheaton, 119. United States v. Hipkin, 2 Hall's Law Journ. 80. United States v. Morgan, 3 Washington, 10. United States v. One case of Pencils, 1 Paine, 400. Warner v. Racey, 20 Johnson, 74.

Dallas, for the postmaster general, in reply.

The effort is not to reject that part of the contract which is admitted to be bad, but that which is admitted to be good. The act of congress requires a collector to give the bond, but does not designate the officer who is to take it. The comptroller is to approve the bond offered. Therefore the act does not give an authority to a public officer to require the bond.

There are in reality but two questions. 1. Is the bond, for all the purposes of this action, valid? 2. Has it been sufficiently declared upon? A reference to the pleadings will show the last point is well established. As to the first; the good part of a condition may be permitted to stand and the bad be rejected, in the case of statute as well as common law bonds, with three exceptions: 1, where it is malum in se: 2, where it is malum prohibitum: 3, where the instrument is verbally set forth and prescribed by the statute. A voluntary bond is not a statutory bond; but Judge Story, in the case of United States v. Sawyer, (1 Gallison, 99,) seems to think that an embargo bond may be called voluntary. The principle of the defendant is, that because the officer has done more than the law allowed, all is void. This is novel to the extent it is now carried. That which is out of the authority is void, but all within it is good. By the twenty-third section of the act of 9th January, 1815, (2 Story's Laws, 1461,) the collector is to prepare and offer his bond to the comptroller for approbation. No officer of the United States is authorised to demand the bond: if there is any thing wrong in it, it is the collector's own making, no public officer had any thing to do in framing it: all, therefore, beyond the law, is the voluntary act of the collector.

On the 26th February, 1831, Judge Hopkinson delivered the following opinion:

In the month of January, 1814, Nicholas Kern, of Northampton county, in the state of Pennsylvania, was appointed, by the president of the United States, collector of direct taxes and internal duties for the eighth collection district of Pennsylvania; and on the 13th of the same month he gave bond to the United States in the sum of twenty-seven thousand five hundred and sixty dollars, with the condition that "the aforesaid Nicholas Kern has truly and faithfully discharged, and shall continue truly and faithfully to discharge the duties of said office, according to law, and shall, particularly, faithfully collect and pay,

according to law, all moneys assessed upon such district." The sureties, bound with Kern in this bond, were Jacob Weygandt and Christian Bixler.

This bond was taken under the act of congress of 22d July, 1813. The form of the bond to be given by a collector, is prescribed by the eighteenth section, and the condition is to be "for the true and faithful discharge of the duties of his office, according to law." The bond given, as above stated, is retrospective, and the condition is, that Kern "has discharged and shall continue to discharge" his duties. His appointment is said to have been made on the 5th January; but, as he was bound to give the security before he received any list for collection, and, of course, before he could perform any of the duties of his office, I cannot perceive for what object or reason the retrospective words were introduced; if, even by law, they could have been added to the condition prescribed by the act of congress. It may be remarked that the bond is printed with the condition I have recited, and was probably prepared in the treasury department, and distributed to all the collectors appointed under the act.

On the 17th October, 1816, Nicholas Kern gave another bond, in the same form and with the same condition as the first, but with a change of the sureties. Robert Brown and Jacob Driesbach are joined with him in the second bond. An inspection of these bonds, and comparison as to paper and type, will show that the same blank form was used for both, there being no difference between them but in the dates, the amount of the penalty, and the names of the sureties. It is on the second bond that the present suit is brought against the administrator of Robert Brown, one of the sureties.

This bond was taken under the directions of an act of congress, passed on the 9th January, 1815. The second section of this act repeals the former, "except so far as the same respects the collection districts, therein and thereby established and defined, so far as the same respects internal duties, and so far as the same respects the appointment and qualifications of the col-

lectors, and principal assessors, therein and thereby authorised and required; in all which respects, so excepted, as aforesaid, the said act shall be and continue in force, for the purposes of this act."

By the twenty-third section of this act, it is provided, "that each collector, before receiving any list, as aforesaid, for collection, shall give bond, with one or more good and sufficient sureties, to be approved by the comptroller of the treasury, in the amount of the taxes assessed in the collection district for which he has been or may be appointed, which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office according to law, and particularly for the due collection and payment of all moneys assessed upon such district." There is, also, a provision, that nothing contained in this act "shall be deemed to annul or impair, the obligation of the bond heretofore given by any collector."

On a settlement of Nicholas Kern's accounts, a balance appears to be due from him to the United States of eighteen thousand nine hundred and thirty-nine dollars, and eighty-six cents, for the recovery of which suit is now brought.

The declaration, in the first count, claims the penalty of the bond, to wit, forty-five thousand dollars, as forfeited to the United States, and sets out, that Robert Brown, on the 17th of October, in the year 1816, by his certain writing obligatory, granted himself to be held and firmly bound in the said sum "to be paid to the United States, whenever he, the said defendant, shall be thereunto afterwards required." A second count in the declaration, recites the bond, and adds "which said writing obligatory was and is subject to a certain condition;" and the condition is recited; the declaration then proceeds "and the said United States in fact say, that the said Nicholas Kern, collector as aforesaid, did not, while such collector, and after the execution of the said writing obligatory, truly and faithfully discharge the duties of the said office according to law, nor particularly, faithfully collect and pay according to law, all moneys assessed upon such district, but made default therein,

and neglected and refused so to do, contrary to the duties of his said office, and the acts of congress; particularly in not paying to the proper officers of the treasury of the United States, the sum of fifty-one dollars and ninety-nine cents, cash by him received as such collector, and after the execution of the said writing obligatory, and so due from him from and on the 31st December, 1821; and further, in not collecting and paying, according to law, the further sum of eighteen thousand eight hundred and eighty-seven dollars and eighty-seven cents, due by uncollected bonds taken by the said Nicholas Kern, as such collector." The death of Robert Brown, the obligor, is then averred, and the granting of letters of administration to William Brown, the present defendant. The bond is a joint and several obligation.

The defendant craves oyer of the bond, and of the condition; and they are read to him, and set out "in hæc verba." 1. In plea, to the first count in the declaration, he then says, "that the said writing obligatory is not the deed of the said Robert Brown," and of this he puts himself on the country. 2. And for further plea to the first count he says, "that he has fully administered," and prays judgment. 3. For further plea to the first count he says "that the said Nicholas Kern did continue truly and faithfully to discharge the duties of his said office;" which he is ready to verify, and therefore he prays judgment. 4. And for further plea to the first and second counts of the declaration, he recites in his plea the appointment of Nicholas Kern, and his commission dated on the 5th January, 1814, as collector, under the act of congress passed on the 22d July, 1813; that the said Kern entered upon the exercise of his office, and continued therein "up to the day of the sealing and delivery of the said supposed writing obligatory." The plea then refers to the act of congress above mentioned, passed on the 9th January, 1815, and particularly recites the form of the bond, with the condition directed to be taken by that act. It further avers that "the said supposed writing obligatory, on the day of the date thereof, and after the said Kern had been a long time in

the exercise of his said office, was required by the said United States to be sealed and delivered by the said Kern, and by the said Robert Brown, as surety of the said Kern, and was by the said United States taken from the said Kern, and from the said Robert Brown, as surety of the said Kern, on the day and at the place in the said declaration mentioned, under colour of the said act of congress of the United States, and contrary thereto." The plea then avers that the condition of the supposed writing obligatory "does not, and did not, conform to the said act of congress," and that the bond and condition were and are contrary thereto, and in violation of the same, "inasmuch as by the said condition of the said supposed writing obligatory, it is provided, that the said Nicholas Kern had, before the sealing and delivery of the said supposed writing obligatory, truly and faithfully discharged the duties of his said office, according to law, and the said supposed obligation was thereby declared to abide and remain in full force and virtue, in case the said Nicholas Kern had not, before the sealing and delivery thereof, truly and faithfully discharged the duties of his said office, according to law. And so the said defendant saith, that the said writing so brought into court is void in law." 5. As a further plea to the second count of the declaration, the defendant says, "that the writing obligatory therein mentioned, is not the deed of the said Robert Brown." 6. There is also a plea of "fully administered," to the second count. 7. As to the first breach assigned, in not paying to the treasury of the United States the sum of fifty-one dollars, and ninety-nine cents, the defendant says, that they "were not received by the said Nicholas Kern, as such collector, after the execution of the said writing obligatory." 8. As to the second breach assigned, he says, that the matters contained in it "are not sufficient in law for the United States to have or maintain their action," and that he is not bound to answer them.

The defendant then states and shows the following causes of demurrer to the said second assignment of breach. 1. That the said assignment of breach does not state and set forth the nature

and circumstances of the said uncollected bonds, nor by whom, to whom, at what time, nor for what amount or consideration given, nor when or to whom payable. 2. That the said assignment of breach does not state and set forth that the said uncollected bonds were taken by the said Nicholas Kern, after the said execution and delivery of the said writing obligatory. 3. That the said assignment of breach does not state and set forth that the said sum of eighteen thousand eight hundred and eighty-seven dollars and eighty-seven cents, became and was due by the said Nicholas Kern after the execution and delivery of the said writing obligatory. 4. That the said assignment of breach does not set forth and state that the default of the said Nicholas Kern, in not collecting and paying the said sum of money, took place after the execution and delivery of the said writing obligatory, and not previously thereto.

To these pleas the United States have replied severally.

As to the first, fifth and seventh, that is, those of the general issue, they also put themselves upon the country.

On the second and sixth, which are pleas of 'fully administered,' they deny the allegation and take issue.

As to the third plea they reply; 1. That after the execution of the said writing obligatory the said Nicholas Kern did not continue truly and faithfully to discharge the duties of his said office, according to law, and did not, particularly, faithfully collect and pay, according to law, all moneys assessed upon the said district, because they say that the said Nicholas Kern continued in his said office as collector from the day of the execution of the said writing obligatory until and after the first day of July, 1825; and that during the said time, that he, the said Nicholas Kern, so continued in his said office as such collector aforesaid, to wit, the said last mentioned day and year, and on divers other days and times after the day of the execution of the said writing obligatory, he, the said Nicholas Kern, in his said office and as such collector aforesaid, had and received for and on account of the said plaintiffs, divers sums of money, amounting in the whole to the sum of eighteen thousand five hundred

and fifty-three dollars and thirty-three cents. 2. That after the execution of the said writing obligatory, and whilst the said Nicholas Kern continued in his said office and as collector aforesaid, he did not faithfully collect and pay, according to law, certain large sums of money assessed upon the said eighth collection district of Pennsylvania, amounting in the whole to the sum of seventeen thousand two hundred and forty-eight dollars and fifty-six cents, but faithfully to collect and pay the same he has hitherto wholly failed and made default.

As to the fourth plea they reply, that the same and the matters therein contained are not sufficient in law to bar and preclude them from having or maintaining their aforesaid action thereof, against the said defendant.

As to the second breach in the second count of the declaration assigned, they say that the matters therein contained, in manner and form, are sufficient in law for them, to have and maintain their aforesaid action against the said defendant.

On these pleadings two general questions have been raised and argued at the bar: one having relation to the declaration, or the manner and form in which the plaintiffs have set out their demand; and the other denying the whole ground of the action, and alleging that the bond or writing obligatory, on which it is founded, is wholly void in law, and that no recovery can be had upon it, in this or any other form of action.

The second question is the most important and will be first considered. It is not the first time it has come before the courts of the United States, but, so far as we may judge from the reports of the cases, it has not, until now, been examined with any considerable diligence or care.

The question, briefly stated, is whether, if the condition of a statutory bond contains more than is required by the statute, the bond is wholly void.

Before we enter upon the examination of this question, I will state the difference which exists in this case, between the bond actually taken and that authorised to be required by the act of congress. The condition of the bond of a collector, prescribed

by the statute, is directed to be "for the true and faithful discharge of the duties of his office, according to law, and particularly, for the due collection and payment of all moneys assessed upon such district." The condition of the bond in question is, "that the said Nicholas Kern has truly discharged, and shall continue truly and faithfully to discharge the duties of his said office." The substantial difference is, that the bond taken, and on which this suit is brought, has a retrospective operation; but the bond directed by the statute has no such operation, but is altogether prospective. The question to be decided is not whether we can give to the bond this retrospectlve effect; that is not pretended on the part of the plaintiffs: but whether, by this departure from the statute, the obligation is entirely void and null, so that no recovery can be had upon it even for defaults or breaches of the condition, which, in truth, were made after the execution and delivery of the writing obligatory.

The argument against the legal validity of this bond is substantially this: that the officers of the United States, by whom this bond was required and taken from Nicholas Kern, and without which he could not receive his appointment as collector, or enter upon the duties of his office, were the agents of the United States, acting by and under a special authority delegated to them in precise terms by the United States: that these agents were confined strictly, or at least in matters of substance, to the terms and limits of their authority: and that if they exceeded their authority, and demanded from a collector a bond differing from that required and authorised by the law, imposing obligations upon him not imposed or warranted by the law, the whole execution of the authority was void. It is further argued, that one of the reasons of this strictness is, to preserve those who are called upon to give such bonds, from injustice and oppression by the officers who are appointed to take them: and this important object cannot be effected if the bond, having in it an illegal or unauthorised condition, shall, nevertheless, stand good for so much as is according to law: that the only remedy and protection against such oppression, under colour of office, is to

declare the whole to be an illegal and void execution of the authority. The moral theory of this argument is good, but we must look further, for the policy and utility of its practical application to the business of the world and the purposes of justice. It is the duty of a court of law to pursue this inquiry into the proceedings of the courts, and to abide by their decisions upon it. It is so purely a question of law, that I shall look to the cases in which it has been agitated or decided, for my judgment upon it. The books seem to have been thoroughly examined, and we have probably all the judicial light that can be brought upon the subject.

Is a statutory bond, the condition of which contains more than is required or authorised by the statute altogether void; or may it be a good and valid obligation for so much as is according to the statute, and void only as to that part which is not according to the statute? I shall take up the cases as they were read at the bar.

Much reliance has been placed on the case of Purple v. Purple, (5 Pickering, 226.) It was briefly this. A replevin bond was given to the officer who executed the writ; the statute required that it should be given to the defendant; the bond was adjudged to be void. It is obvious, that this case does not meet the question we are discussing. It was not the case of a bond good in part, and bad in part; of a bond with a divisible condition. No attempt indeed was or could be made, to support it on that ground. It was at once given up as a statutory bond; as such an obligation or instrument as could be supported by and under the statute in whole or in part; and the effort made was to maintain it as a good bond at common law. The court, in deciding against it, say, "the bond could, in no sense, be taken to be according to the statute." And again, they say, "it stands as a bond given to one who had no lawful authority to take it; and the purpose and effect of it were to aid and abet him in a trespass upon the attaching officer; it is therefore illegal and void."

The case of Johnston v. Meriwether, (3 Call. 523,) is also a case of a statutory bond given to a wrong person; to one not authorised by law to take it, and not divisible. It must necessarily be wholly good or wholly bad. On the service of an execution, an obligation called a 'forthcoming bond,' was given to the coroner instead of the plaintiff in the action. The court give no reason but it is said briefly, that if such a bond be not good as a statutory bond, it may be good at common law.

In the case of Newman v. Newman, (4 Maul. & Sel. 70,) part of the condition of the bond, was for the payment of money and part for the presentation of the obligee's son to the next avoidance of a church. It was there held that, if the latter part of the condition was simoniacal, yet the bond was good for the payment of the money. Lord Ellenborough says, "admitting the condition of this bond to be ill as to one part of it, it seems that it may be well as to the other parts, for you may separate at the common law the bad from the good." From this case we learn, that there is no principle of the common law, which forbids us to separate the good from the bad part of the condition of a bond, where they are of a nature to be severable: and the difference between a bond at common law, and one executed under the directions of a statute, seems to be only, that in the latter case the bond is required and given under an authority derived from the statute, and it is therefore asserted that the authority must be strictly pursued; and that if it be exceeded, the whole execution is null and void. This principle will be attended to.

The case of Warner v. Racey (20 Johnson, 74,) was also one of a bond given to a wrong party. It was made payable to "the people of Niagara county," instead of "to the people of the state of New York." The court very shortly say; "the bond is not according to the statute: and if it were, there is no evidence of any breach."

The case of the United States v. Sawyer, (1 Gallison, 99,) decides some questions in pleading which belong to another part of our case. As to the part we are now inquiring into,

there is no direct opinion given, for the learned judge thought the bond was taken substantially, according to the act of congress. The objections, however, made to that bond were essentially the same with those urged here, on the part of the defendant. That to every contract there must be two parties. That the United States can contract only according to the regulations and authorities of statutes. That the assent of the United States can be declared only through their authorised agents; and these agents cannot effectually assent, unless they are clothed with the authority by law. An assent, therefore, in a manner different from that prescribed by the law, is not valid, and consequently does not bind at all. The judge, as I have said, was of opinion, that, on a fair construction, the bond was conformable to the law. He, however, puts as a question, on which he gives no decision, whether a bond taken by a collector, under a general authority to take bonds in revenue cases, would be void on account of any irregularity or mistake in the condition? Whether such a bond, where the condition is partly conformable to, and partly variant from, the provisions of the statute, be void in whole, or good as to that part of the condition which is conformable to law? The judge significantly adds, "that the principles, on which such bonds are adjudged to be wholly void, will encounter much opposition from the authority of decided cases." This was in the year 1812.

Pigot's case (11 Coke, 27,) was one of debt on a bond, and plea, non est factum. The bond was given originally to the plaintiff, Benedict Winchcombe, in sixty pounds. After the execution and delivery of the bond, the words "sheriff of the county of Oxford" were inserted after the name of Benedict Winchcombe, and before the words "in sixty pounds;" the obligee being, in fact, sheriff of Oxford, and the bond an official bond. The interlineation was made without the privity of the obligee. The case turns upon the effect of this interlineation in the bond. It is said, it was moved at the bar, when a deed shall be good in part and void in part; and as to this, Lord Coke says, "I conceive there is a difference when a deed is

void ab initio, and when it becomes void by misfeasanee, ex post facto: also, when the deed which is void ab initio, doth consist upon the entirety, and when upon divers several causes; and in these, also, there is a difference, when the several clauses are absolute and distinct, and when they are several, and yet the one has dependency upon the other." The report goes on to state, "that it was unanimously agreed in 14 Hen. VIII. 25, 26, that if some of the covenants of an indenture or of the conditions indorsed upon a bond, are against law, and some good and lawful, that in this case the covenants or conditions which are against law are void ab initio, and the others stand good." In this reference to the unanimous judgment in 14 Hen. VIII, no distinction is noted between a common law and a statutory bond; but we must observe, that the case in which it is cited by Lord Coke, was one of an official statutory bond. It is further said in this case "that if there are two absolute and distinct clauses in a deed, and the one is read to the party not lettered, and the other not, that the deed is good for the clause which was read, and, ab initio, void for the residue."

Buller, (Ni. Pri. 171,) cites the case we have just referred to, and thus expresses himself; "if part of the condition be bad by common law and part good, the deed will be good for that part of the condition which is good: aliter, where part is made bad by statute." No such distinction is found in Pigot's case. Besides the words "part is made bad by statute" import something mueh stronger than the mere addition of a condition, not authorised by the statute, to one that is.

The case of Norton v. Simmes (Hobart 13,) was a decision upon the words of the statute of 23 Hen. VI. It is said "the difference was taken between a bond made void by statute, and by common law; for if, upon the statute of 23 Hen. VI, a sheriff take a bond for a point against that law, and also for a debt due, the whole bond is void; for the letter of the statute is so." This statute prescribes the form of the bond or security which a sheriff shall take; and we thus understand what

is intended in Hobart, by the expressions of a bond "made void by the statute" and "taken for a point against that law."

In the case of the United States v. Smith (2 Hall's Law Journ. 456,) this statute and the decisions upon it are noticed. It was an action on a bond executed by the defendant to the United States, and delivered to the collector of the port of New York, taken under the second section of the embargo act, of 22 December, 1807, (2 Story's Laws, 1071.) It was contended to be a void bond, because not made in conformity with the act, which required the security "to be given to the collector of the district," and this was made payable to the United States. The condition, also, was to reland the goods at the said port of St. Mary's, or at some other port of the United States. The words of the act were that they should be relanded "in some port of the United States." Judge Talmadge said, that the law prescribed no form of bond, nor avoided any that might be adopted. He thought, "the bond, as taken, embraced the substance and was within the spirit and authority of the act, a voluntary bond and valid." He observes, that the English authorities cited were decisions upon the particular words of the statute of 23 Hen. VI, authorising and requiring bail bonds, "which statute prescribes the form of the security and declares all others to be void."

The doctrines of this decision receive a strong confirmation in the case of Morse v. Hodsdon, (5 Mass. Rep. 314,) where it is laid down, that if the officer to whom a writ of replevin is directed and delivered, take from the plaintiff a bond not conformed to the requisition of the statute, which is voluntarily executed by the plaintiff, he shall not avoid it on that account. How was this a voluntary bond more than that we have to deal with? The officer of the law appointed to take the bond and execute the writ required it, and the plaintiff could not get his goods without executing it. The officer, too, acted by the authority of the statute in requiring and in taking the hond. The variance was a very important one. By the condition of the bond taken, the penalty was declared to be forfeited if the plaintiff, in the replevin, did not prosecute this suit to judgment and

recover; whereas it should have been to return the goods and pay damages and costs. Chief Justice Parsons says, "If a plaintiff execute an informal bond voluntarily and to obtain possession of his goods, and the officer thereupon deliver him the goods, the defendant in replevin may, if he please, accept the bond, and pursue a remedy at law upon it against the obligor, unless the bond be void by the common law or by statute." As to a bond void by statute, the chief justice says: "if it be void, it must be so in consequence of the statute directing the form of the writ of replevin. True it is that the condition, in this case, is variant from the form there directed; but that statute does not prohibit the taking a bond of any other form, or declare a bond of any other form void." The chief justice considers this bond to be a voluntary bond. He observes, "they were not obliged to give this bond; and if a formal bond had been tendered to the officer he must have executed the writ;" and concludes, "the bond must be good, unless it be declared void by the common or statute law: we know of no law by which it is made void."

The case of Clap v. Guild, (8 Mass. Rep. 153,) was a replevin for goods valued at one hundred and fifty dollars. The officer was directed to execute the precept if the plaintiff first gave bond in three hundred dollars. He took a bond for eight hundred. It was objected that "the bond was not taken according to the command of the writ, nor pursuant to the directions of the statute." The objection was overruled.

In 1811, the case of Armstrong v. United States (Peters C. C. Rep. 46) was decided in this circuit. It was on the equity side of the court. The material circumstances were these. In June, 1796, one Smith was appointed to collect the internal revenue of a district in New Jersey, and gave bond with one Willis as his surety: he was afterwards required to give additional security, and in January, 1799, he, with the complainants as his sureties, executed a new bond, with condition that he had faithfully executed the duties of a collector, and would thereafter faithfully execute the same. Smith, the principal, was

then indebted to the United States for collections previously made, and became further indebted during the year 1799. Suit was brought by the United States on the last bond, to recover the whole. The plaintiff offered to pay the amount which became due since January, 1799. On this case Judge Washington decided, "that the substantial form of the bond required by the act of congress was prospective only; and that when a statutory bond is taken, it ought to conform, in substance at least, to the requisitions of the statute; and if it go beyond the law, it is void, at least so far as it does exceed those requisitions. That this was an official bond, which the supervisor had a right to demand, and Smith was obliged to give, if he meant to continue in office." The result of this case was, that the whole bond was not declared to be void; nor did the complainants ask it; but an injunction was granted, except as to the sum liquidated and stated as having been due since January, 1799, with interest. We must remark here, that the judge recognises the principle that the good and the bad parts of the bond might be separated, and the condition be affirmed and executed as to the one and rejected as to the other. It is something, too, that Mr. Stockton, whose ability and attention to the rights of his clients were not surpassed, did not ask an exemption from the responsibilities of this obligation, except as to that part of it which was not authorised by the law. I should not, perhaps, omit further to remark, on this case, that Judge Washington seems to me to express himself inaccurately when he says, or is reported to say, that this was an official bond which the supervisor had a right to demand, and Smith was obliged to give. I should rather say, with Chief Justice Parsons, that Smith might have refused to execute this bond, and should have tendered one made in conformity with the act of congress, and the supervisor would have insisted on his own form at his peril. Fifteen years afterwards the same judge expressed the same opinion upon the point we are examining. In the case of the United States v. Howell, (4 Washington, 620,) he says; "It has been made a point whether a bond, not being required to be taken by any act of con-

gress, is a valid one? My opinion on this point is, that where a statute requires an official bond, and prescribes substantially the terms of it, it must conform to the requisitions of the statute; and if it go beyond them it is void, so far at least as it exceeds those requisitions."

The case of Dive v. Manningham, (Plowden, 60,) cited by the defendant's counsel, was a decision upon the statute of 23 Hen. VI, which, as we have already seen, expressly declares all bonds, taken under the statute, to be void which are not made in the manner prescribed by the statute: it was the case of a bail bond given to the sheriff under that statute. The judgment of Chief Justice Montague is principally given on questions of pleading, and on the construction of the statute. As to one point he says, "and it seems to me that the obligation here is void by the letter of the statute;" which avoids "obligations taken in any other manner than the statute limits;" and a reason is given for this strictness, which has a peculiar application to the bonds provided for by that statute, and the abuses intended to be prevented by it. The case referred to by the chief justice in 7 Ed. IV, was also decided on the words of the statute: "the court there, also, held that if the obligation has not the conditions expressed in the statute, it is not the deed of the party." The chief justice, still continuing his remarks upon this statute, does say, "I apprehend that if the obligation had been conditioned according to the statute, and had another thing also in the same condition, that the obligation, by reason of this condition, would be utterly void." And why? He has told us before, by the express letter of the statute. This, however, is the dictum of one of the judges, on a point not in the case decided.

There is nothing in Townsend's case, (Plowden 111,) that has any judicial authority or bearing upon the question we are considering.

Lee v. Coleshill (Croke Eliz. 529,) was an action of debt on an obligation made to one Smith by the defendant, with a condition for the performance of covenants between Smith and

Coleshill, whereby Coleshill, being a customer of London, made Smith his deputy, in the said office, and covenanted to surrender these letters patent before a certain day, and to procure new ones to himself and Smith; as also, that Coleshill should pay the executors of Smith three hundred pounds. The defendant showed that by the statute of 5 Ed. VI, all promises, bargains, and contracts, for the buying of divers offices, whereof this was one, were void. The plaintiff argued that he should have judgment, "for there be many covenants within the indenture, whereof some are good and lawful, and for these, doubtless, the obligation remains good." The defendant's counsel replied that "all parts here of this indenture concern the exercising of the office; and, if any of the covenants concerning other matters should be accounted good, yet the obligation is void in all, for the statute saith, the bond to that purpose shall be void, and then it is not possible it should be void to this intent and good for another." The argument of the defendant, here, was on the words of the statute expressly declaring the bond to be void; and also, on the allegation that all parts of the indenture concerned the exercising of the office. We do not know on what ground it was decided. The reporter merely says; "wherefore the court here did not deliver any great opinion; but, absente Walmsley, adjornatur." And it was afterwards adjudged, that the obligation was void in every part, being against law.

A distinction, and it is a natural one, seems to run through these cases. It is this. Where a statute authorises a bond to be taken in a prescribed manner or for certain expressed purposes, and declares, that if it be not so taken, the bond shall be void, then it may not stand good for any purpose, however lawful in itself, if it be not conformable to the statute; but where the statute only directs the condition of the bond, and does not avoid it if it should not conform to the directions, and something more than that condition is added to it, the bond may be allowed to cover the authorised part of the condition, and so much may be recovered under it, and no more.

The case of the United States v. Morgan, (3 Washington, 10,) has been greatly relied upon by the defendant, and calls for a particular attention. It was an action on an embargo bond, tried in this district at April sessions, 1811. The plea, to which there was a demurrer, presented three objections to the bond. 1. That the collector, and not the United States, should have been the obligee. 2. That the condition of the bond omits to insert the words "dangers of the sea excepted." 3. That it binds the defendant to deliver to the collector at Philadelphia, where the bond was taken, the certificate of relanding in the United States, within three months from the date of the bond. None of the arguments of counsel are given, and the opinion of the court is very brief. Judge Washington says, "The bond is a statutory instrument; the officer had no authority to take it, but in virtue of a power conferred on him by the government of the United States; the power should have been at least substantially pursued. The embargo law prescribes the material parts of the bond to be taken. It is to be in a sum of double the value of the vessel and cargo, with the condition that the goods shall be relanded, dangers of the sea excepted." We see, then, that the bond in that case, stipulated for a relanding absolutely, when the law allowed an essential exception, and required the relanding accordingly. The bond was declared to be void by the judge. 1. Because the condition required the obligors to reland the cargo in the United States, although they might have been prevented by a peril of the sea. 2. Because the condition requires the obligors to return the certificate of relanding to the collector at Philadelphia, within a limited time: whereas, the law did not impose upon the obligors, the necessity of returning the certificate to that officer at all, much less to do it within a prescribed period. In comparing this case with that under our consideration, an important difference at once strikes us. The condition of that bond was not, as ours is, in its nature or terms divisible. There was not in it a part which was bad, and a part which was good, and so set forth that they might be separated from

each other; that the one might be retained, and the other rejected; that the obligation might stand good for the one, and not for the other; that the United States might say, on the record, we ask for a judgment only on so much of this condition and its forfeiture, as is according to law. It is impossible to make the bond in Morgan's case conform to the law, by taking away any part of it. You must make altogether a new and a different condition; you must add an important qualification or exception given by the act of congress, and not given by the bond; and you must essentially change, indeed expunge another part of the condition, which was not warranted by the law. In short, you must make a new contract between the parties. It was a very plain case, and this may account for the little attention that was given to the argument. Three or four cases appear to have been cited for the defendants, and not one by the United States. We may say that the ground was abandoned by the plaintiffs, and very properly.

I ought not to omit some general remarks or principles which fell from the judge. He says, that if the bond "bind the obligors to do more than the law requires, it is not the bond which the officer was authorised to take, and all is void." Now this is true as applied to such a case as he had in his view; where an absolute relanding was required, instead of a conditional one; and where a certificate was required to be delivered to a certain officer, and at a certain time, neither of which was warranted by the law. But that the judge did not mean to say that in all cases, in which the bond binds the obligor to do more than the law requires, all is void, may be inferred from his expressions in the cases already cited; one of them, that of Armstrong v. the United States, being decided six months after Morgan's case; and the other that of the United States v. Howell, fifteen years later. In both of these, he qualifies the principle, by adding, "at least so far as it exceeds the requisitions of the law."

The case of the United States v. Hipkin, (2 Hall's Law Journ. 80,) was decided in the district court at Norfolk. No opinion was given by the court, nor was any necessary. The

objection to the bond was that the condition was contrary to the express provisions of the law. It was not a case of a condition with several stipulations, divisible from each other, some according to law, and others not so. The district attorney admitted that no recovery could be had for the breach of a condition that was not authorised by the law which required the bond.

The cases of Rex v. Croke (Cowper 29,) and Thatcher v. Powell, (6 Wheaton, 119,) sustain the general principle that powers given by statutes to public officers must be strictly pursued. These cases have no particular analogy to this.

In the case of Bolton v. Robinson, (13 Serg. & Raw. 193,) Judge Duncan gives the opinion of the court, and says, "This obligation is a statutory one, with an entire unwarranted condition; so far from conforming to the requisitions of the act it is in direct contradiction." He then quotes the opinion of Judge Washington, not for his general expressions in Morgan's case, but with their qualifications in that of the United States v. Armstrong, "that a statutory obligation ought to conform, at least, in substance, to the requisition of the statute: and if it go beyond the law, it is void, at least, so far as it exceeds the requisition." The judge says, "The act required bail in the nature of special bail: the bail taken was absolute for payment of the debt. The whole was excess, and the condition was therefore against law. It did not consist of several parts, some of which were good, and some bad; and therefore the whole was void."

The case of Norton v. Syms, (Moore, 856,) so far as it bears upon our point, refers to Coleshill's case, which we have already considered.

From this examination of the cases we may consider it to be settled, that if a bond be taken at the common law, with a condition, in part good and in part bad, a recovery may be had on it for a breach of the good part. This being the general common law principle, it is incumbent upon the defendant to show that a different rule is established in regard to a statutory obligation, on a bond authorised and required to be taken by a

statute. An able and laborious endeavour has been made to sustain this distinction by the cases, and arguments drawn from them, to which I have referred with a careful examination. In my opinion the distinction is not supported, as applicable to a case like the present, in which there is nothing in the statute declaring that bonds, that vary from the prescribed form, shall be altogether void, and in which the good part of the condition may be easily separated from the bad. Nothing is required to be added to the contract; and nothing to be taken from it, but what is favorable to the obligor, by diminishing the extent of his responsibility.

JUDGMENT for the United States on the demurrer.

DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

MAY SESSIONS, 1830.

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JOSHUA BRACKETT, A. P. DOLE, NICHOLAS READ, EDWARD S. CARR, JOHN WHEATON, FREDERICK VANDEFORT, EBENEZER LAKEMAN, AND MARK HENCKLE

*v.*

SUNDRY ARTICLES SAVED FROM THE WRECK OF THE BRIG HERCULES.

1. Where a portion of a vessel which has been wrecked, is saved by the exertions of the seamen, brought to the United States, and sold, they have a lien on the proceeds for their wages.
2. Where a portion of a vessel which has been wrecked, and the seamen who formed its crew, are both brought to the United States on board of another vessel, the master of such vessel has a lien on the property for the freight, but not for the passage money of the seamen.
3. Where a surplus remains in court from the proceeds of a sale, made for the benefit of a lien creditor, it may be appropriated in payment of other liens on the original property, but not of debts arising on contracts merely personal.
4. Where a sum of money in court, has been decreed to be paid to a libellant, the court will not, on application of a creditor, appropriate it to a debt due by the libellant.
5. A contract between a passenger and the master of a vessel for the passage, is a personal contract, not cognisable in the admiralty.

ON the 22d June, 1830, the libellants, who had been seamen on board the American brig Hercules, which was wrecked on the 25th April, 1830, at Guazacoalco, on the coast of Mexico, filed their bill against sundry articles saved from the brig and

brought into the port of Philadelphia, on board of the schooner Packet, in which vessel the libellants also returned. The libellants claimed the full payment of their wages, and salvage for the articles saved. On the 25th June, the articles in question were sold by the marshal, under an order of the court, for the sum of nine hundred and thirty-four dollars and thirty-six cents. One half of these proceeds were paid, the libellants assenting thereto, to Samuel Baldwin, the owner of the schooner Packet, for bringing the goods safely in the schooner to this port. Out of the remaining half, and also by consent of parties, two hundred and thirty-four dollars and thirteen cents were paid to the libellants. The residue remained in court to await a final decree.

On the 26th June, Samuel Baldwin, as owner of the schooner Packet, and Constant Chase, master of the brig Hercules at the time of the wreck, filed claims against the fund remaining in court; both praying that the passage money of the libellants might be deducted from the fund, and paid to the said Samuel Baldwin.

On the 23d July, the case was argued by Grinnell for the libellants, and J. R. Ingersoll for the respondents and claimants.

On the 26th November, Judge Hopkinson delivered the following opinion:

The libel in this case, filed on behalf of Joshua Brackett, Frederick Vandefort, Ebenezer Lakeman, Mark Henckle, A. P. Dole, Nicholas Read, Edward S. Carr, and James Wheaton, sets forth:

That on the 21st October, 1829, some of the libellants shipped, at the port of Boston, on board the brig Hercules, Constant Chase, master, on a voyage described in the libel, at certain wages also set forth; others of them shipped at Savannah; and one of them at Havre de Grace. That on the 25th April, 1830, the brig, while proceeding on her voyage, was wrecked near Guazacoalco, and that certain enumerated articles were saved from the wreck, which have been brought into the port

of Philadelphia. The libellants state that they were employed in saving and securing the said articles until about the 28th April, 1830, and arrived at Philadelphia on the 17th June. The prayer of the libel is, that the articles so saved, and now in this port, may be attached; and that a decree be made that the wages due to them be paid thereout. They also claim a salvage on the articles saved.

The claim and answer of Constant Chase, the master of the brig, admits that the libellants were severally shipped on board the brig as they have set forth, and on the voyage described. It is alleged that Frederick Vandefort, Ebenezer Lakeman, and Mark Henckle, left the brig one afternoon without liberty; that they came on board in the evening after dark; that next morning, after orders to go to work, Vandefort and Lakeman refused to do any duty; and that it was necessary to put them in prison. This happened at Savannah. They remained in prison about eleven days, when the vessel was ready to sail. She sailed and arrived at Havre, where she remained about six weeks. At Havre, Vandefort left the brig without liberty about the 1st February, and sprained his ancle while absent, which confined him for thirty days, doing no duty. The respondent paid twelve dollars for his board on shore, and two dollars and twenty-nine cents for his doctor. Sometime in February, Lakeman also was absent without liberty, and in a fight was so injured as to be kept from duty eight days. The brig sailed from Havre on the 2d March for Guazacoalco, where she arrived on the 16th April, and anchored outside of the bar. On the 24th a gale came on, by which she was driven on the beach and wrecked. The materials were got on shore on the 28th. The respondent endeavoured to sell them, but could not. He therefore made an arrangement with the owner of the schooner Packet, to bring the materials to the United States. A copy of this agreement is annexed. The respondent further states, that he applied to the owner of the schooner Packet; stated to him, that the men would die, if they should be left there; and referred him to the men themselves for a contract

for their passage, which he understood was made afterwards. He understood Mark Henckle to say, that if he could get away in the schooner, he would give all he had coming to him in the brig. The schooner had six persons, all told, as her crew. The men were brought to Philadelphia and safely landed there. The usual price of a passage on deck is thirty dollars. The answer prays that a deduction may be made from the fund, out of which their wages are payable; and that the amount of the passage money may be decreed to the owner of the schooner Packet.

A claim and answer has also been filed by, or on behalf of, Samuel Baldwin, owner of the schooner Packet. In it he sets forth; that on or about the 16th May last, an agreement was made between him and the libellants for their transportation to the United States; that they came out under that contract and were safely landed in the United States at Philadelphia on the 17th June last. He then prays that out of the fund now under the control of the court, so much may be decreed to him as will pay the amount of the passage money, each of the libellants being charged for himself. The respondent alleges that the possession of the materials has never been parted with, further than to place them in the hands of an auctioneer for sale, subject to the direction and control of the respondent; that he is advised that his lien for freight and passage money remains; and that the said fund is subject to the disposition of this court.

The replication of the libellants admits that they were brought in the schooner Packet from Guazacoalco to Philadelphia; but they deny that any contract for the transportation was made between them and Samuel Baldwin; and they further allege, that they assisted in navigating the schooner on her passage from Guazacoalco.

The contract referred to, made between Captain Chase and Samuel Baldwin, makes no provision for the passage of the crew of the Hercules, but contains the terms on which the latter will bring to the United States the articles saved from the wreck. This contract has been fully complied with, and Samuel

Baldwin has received one half part of the proceeds of the sales of those articles, according to the terms of the contract.

The claim of Samuel Baldwin, to be paid for bringing the libellants home, rests on his averment and proof, that an agreement was made between him and them for their transportation to the United States, by which, according to his proof, they were severally to pay him twenty dollars for their passage. Although the evidence in support of this agreement is not explicit or clear, yet, as the demand is altogether equitable in its principle, and reasonable in the amount, I shall consider that the libellants are truly indebted to Captain Baldwin in the sums he claims; that is, twenty dollars each, for bringing them in his schooner Packet from Guazacoalco to Philadelphia. The question for decision therefore is reduced to this point; whether or not, this court is authorised and required to order, that this claim shall be paid and satisfied out of the funds now in court, which proceeded from the sale of the articles brought home in the Packet, and saved from the wreck of the Hercules. On the arrival of the schooner at this port, the articles were landed and put in a storehouse, where they were attached by process from this court, issued on the petition of the libellants, and afterwards sold by the marshal, under the decree of the court. It is a question of law to be decided on settled principles, as I do not find that the precise case has ever been determined.

The original proceeding was a suit by the libellants against the property of the owners of the brig Hercules, for the recovery of wages alleged to be due to them for services rendered on board of the said brig. It is not questioned that they have a lien on this property for their wages. In this suit, such proceedings have been had, that the goods proceeded against were sold by the officer of the court, and the money brought into court to answer the claims of the libellants; here a third party steps in, and gives the court to understand that these libellants are severally indebted to him in a certain amount, and prays the court to satisfy these debts out of the moneys which may be awarded to the libellants, on their claim

for wages; that is, the court, in this collateral way, are to try another cause, thus ingrafted on one properly before it; to decide that cause; and to execute their judgment by laying their hands on the money in court, and diverting it from the parties to whom their decree has awarded it, to pay their debts due to a person not a party to the suit in which the money was recovered. If the court may do this, a case can hardly occur in which it could be more justly done than in the present. The libellants have received an essential service from the claimant, whose demand for remuneration is proved to be reasonable; and the refusal to pay it has no warrant in equity or good faith. I am, however, bound to make my decree by the established principles of law, and not by my sense of what is right and just between the parties.

I know of no cases in which this court has undertaken to distribute moneys in court, in payment of a debt of one of the parties to a third person, except where such moneys are what is called surplus, or remnants; that is, money remaining after the satisfaction of the decree, under which and for which the property that produced the money was sold. The law of such cases was well considered in the case of Gardner v. The New Jersey, (1 Peters Ad. Dec. 223,) and, I believe, has remained as there pronounced, to this period, unimpeached in this district. The vessel was sold on a decree for wages. After payment of the sums adjudged to be paid to the libellants by the decree, there remained in court a surplus or remnant of money, the proceeds of the sales. The master filed a petition, stating, that during the voyage he had expended two hundred and fifty-seven dollars for pilotage, mariners' wages, and other things for the use of the ship. The physician claimed also one hundred and sixty-seven dollars, as due to him for services on board. They both prayed to be paid out of the surplus moneys remaining in court, from the sale of the ship. These claims were good and valid against the owner of the ship, to whom the surplus belonged. The judge says, that when he first came into the court, he had, in several instances, distributed surplus moneys

under the idea that he had power to do so. This practice soon involved him in many difficulties and mistakes. He therefore settled some general rules for such cases; and the rule he adopted was, "that it shall appear, that a sum, claimed out of a surplus or remnant, is either of itself or in its origin, a lien on the ship, or other thing out of which the moneys were produced." He justifies going thus far by a reference to the civil law, the English chancery, and even the courts of common law. It seems to me to be an equitable rule, for as by the act of the court, the thing on which the lien rested, has been disposed of and taken from the creditor to satisfy a prior right or lien, it is just, that what shall remain, after that prior right is satisfied, should be appropriated to the subsequent claim and lien. The judge thought that the advances made by the master to mariners, and advances for necessaries in foreign ports, are liens on the ship. If the master pays demands, which were a lien on the ship, he represents the claimants, and the lien continues on the moneys produced by the sale of the ship. But he is of opinion that he could not award, from the surplus, the money due to the master for his own wages, because his contract is clearly personal, made with the owners, and not on the credit of the ship. On these principles, the judge declared that there was no foundation for the claim of the physician. He says; "if claims or liens are legally attached to things or moneys under the cognisance, or within the jurisdiction of the admiralty, this court has power to decide respecting them. But it does not follow, that claims independent of such things, or moneys produced from them, and mere personal demands on their owners, are within the reason of, or entitled to, the remedy prescribed by this principle." The physician could not have sued in the admiralty for his demand, which is personal on the owners of the ship.

In the case of Wolf v. Summers, (2 Campbell, 632,) Justice Lawrence says; "The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing, when he is about to leave the vessel; but I think the

lien does extend to any other property he may have on board. A certain sum is agreed to be paid for carrying the man and his luggage."

In the case before the court, the claimant, Captain Baldwin, has been paid for carrying the goods or things, which have produced the money in court; one half for bringing the whole, according to his contract. The passage of the men has no connection, either in fact or in law, or by the terms of his contract, with the transportation of the goods. On the goods, which have been sold by the decree of this court, Captain Baldwin had no claim of any sort. Their freight has been paid, and he was bound to deliver them at Philadelphia, for the use and benefit of the owners, as their property. He now claims the proceeds, not for any demand he has against the articles or the owners of the articles, but for the passage of the sailors, to whom they did not belong, and with whom he had a personal contract for bringing them to the United States. In making this contract he had no reliance on, he gave no credit to, these goods or their proceeds. These articles would not have been answerable, in the hands of the owners, for these debts of the sailors; how then can they be so here? Captain Baldwin could not, on any principle or in any shape, have proceeded against them in this or any other court, for these debts. There never was any lien on them for this demand; they could not have been detained from the owners on this account, who, on paying their freight, according to the contract, would have received them clear of any other charge by the carrier.

Nor has this court any jurisdiction to try and determine this demand. It is strictly a personal contract, not made at sea, nor for any cause cognizable in the admiralty. It must be prosecuted before a common law tribunal, in like manner as any other personal contract and debt. It is true the money now in court belongs to these men, by virtue of the decree of the court; but by what authority can I undertake to pay it to a particular creditor, or to distribute it among all their creditors? In the language of Judge Peters, I should soon "be involved

in many difficulties and mistakes," by assuming this office. I must try the case of every creditor preferring a claim.

This is certainly a novel case. No claim like the present has ever before, in my knowledge, been presented to a court of admiralty. It is not a case of surplus and remnants, in which the petitioner, having a claim against the defendant in this court, asks for the money, which shall remain after satisfying the decree of the court in favour of the libellant; such creditor or petitioner, having had a claim or lien on the property, from which the moneys were produced. The peculiar feature of this case is, that the petitioner does not ask for the surplus funds of the defendant, but for the money which has been ordered and adjudged to be paid to the libellants. It is not a case of surplus or remnants to be appropriated in favour of a creditor, having a secondary right in the goods sold, but an application to take from the libellants the money which has been decreed to them, and appropriate it to the payment of one who claims to be their creditor. This is going far beyond any case of surplus and remnants, and has never, I believe, been attempted by any court of admiralty, which, in so doing, would try a cause collaterally, of which directly it could have no jurisdiction.

As far as this power of distributing surplus funds has been exercised by the court, I am willing to continue it, but I have no disposition to carry it further.

I must dismiss the claim of Captain Baldwin, although I should have been pleased to have done otherwise, as it appears to me to be just and moderate, and the objection to it altogether without equity or good reason.

Decree. That the wages of the libellants be allowed, to be paid according to a settlement agreed on by counsel; and that the claims of Samuel Baldwin and Constant Freeman be dismissed with costs.

## DISTRICT COURT OF THE UNITED STATES.

### Eastern District of Pennsylvania.

NOVEMBER SESSIONS, 1830.

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JOSEPH POOL

*v.*

JOHN WELSH, OWNER OF THE BRIG JUNIATA.

1. The payment of three months' wages, under the act of 28th February, 1803, is confined to cases of the voluntary discharge of seamen in a foreign port.
2. When a voyage is broken up without necessity in a foreign port, and the seamen are discharged, without payment to the consul of the three months' wages required by the act of 28th February, 1803, the court will, on a libel of the seamen, compel the owner to pay the three months' wages, two thirds to the seamen, and the other third for the use of the United States.
3. It may be doubted, however, whether the intention of congress was to require or permit the payment to be made, elsewhere than to the consul at the port of discharge.

ON the 18th June, 1829, the libellant shipped at Philadelphia as a seaman on board the brig Juniata, bound to Antwerp and thence to Cadiz, his wages being fourteen dollars a month. On the 4th August, the vessel, having left Antwerp, encountered a gale by which she was driven ashore, near Flushing. While lying there, the mainmast was cut away, and the vessel continued for some days embedded in the sand. A survey was made by two captains of American vessels then at Flushing, who decided that "the expense of getting her off, and the necessary repairing, would amount to more than the value of the

vessel after being so repaired." On the 15th August, she was, however, got off, and proceeded to Antwerp, a distance of seventy miles, where she arrived on the 17th. After a fresh examination, the captain determined to abandon the voyage on account of the state of the vessel, although no new survey appears to have been made. He informed the sailors of this determination, and advised them to ship on board of another vessel. The American consul also offered to provide passages for them to the United States, in American vessels, they doing duty on board of them. This was not accepted by the libellant, and some of the rest of the crew, who demanded the two months' pay allowed by law on the discharge of an American seaman in a foreign port. On the refusal of such payment, and the sale of the hull and spars of the vessel in their damaged state, which occurred soon after, the libellant returned by way of England to the United States.

On the 19th March, 1830, the libel of the libellant was filed, claiming from the respondent, as owner of the brig, three months' wages, two thirds thereof to be paid to himself, and the other third to remain for the use of the United States. The answer of the respondent denied his liability, on the ground that the discharge of the libellant at Antwerp was not voluntary, but resulted from unavoidable necessity, the brig not being in a capacity to perform the residue of her voyage.

On the 31st December, 1830, the case came on to be heard before Judge Hopkinson. Evidence was offered by the respondent to prove that the vessel was so much injured as to be unworthy of repair, and that the voyage was abandoned from necessity. The libellant, on the other hand, produced testimony to show that, in fact, the injury by reason of her running ashore, might have been repaired, at comparatively small expense, on her return to Antwerp; and that, therefore, the abandonment of the voyage, and discharge of the crew, were not absolutely necessary.

The case was argued by Broom for the libellant, and Grinnell for the respondent.

Broom for the libellant.

The claim of the libellant is founded on the third section of the act of 28th February, 1803, which provides, that whenever a vessel belonging to a citizen of the United States, is sold in a foreign country, and her company discharged, or when a seaman who is a citizen of the United States, is discharged with his own consent in a foreign country, the master must exhibit to the consul the certified list of his ship's company, and pay to the consul for every seaman designated on the list as a citizen of the United States, and so discharged, three months' pay above his wages due, two thirds of which the consul is to pay to the seaman on his engagement on board of any vessel to return to the United States, and the other third he is to retain for the fund for the maintenance of destitute American seamen. It is not denied that the libellant was discharged, and no three months' wages paid. Does the respondent establish a sufficient legal reason for their not being paid? If the necessity of the discharge can ever afford one, it must at all events be necessity of the most urgent kind; not such as will enable a merchant, desirous of changing his voyage, to get rid of his seamen without expense. He must have no option. His vessel must be a wreck. If he can repair her he must do so; or if he does not choose, he must provide for his seamen, who are thrown ashore destitute, by a contrary determination. If he is bound, as he undoubtedly is, when his vessel is damaged, to send on the cargo to its place of destination; so is he bound to provide, in the manner the law has pointed out, for the future welfare of his crew, with whom his contract has been suddenly broken. But does the law admit even the absolute necessity of abandoning the voyage, to be a ground for discharging the seamen without any future provision? A previous section seems to designate the only circumstances under which a captain is allowed to leave a seaman, without such provision, in a foreign country, and they are when he dies, absconds, or is forcibly impressed into other service. It does not include the abandonment of the voyage, even when caused by necessity,

because it was intended that a provision for such an event should always be made. The owner is to calculate for it exactly as for the other expenses of his voyage; it is as much part of them as are the wages stated in the shipping articles. It is not to be regarded as a penalty for a default, but a contribution incident to navigation. It may be further observed, that although the act of congress declares that the three months' wages shall be paid by the master, and to the consul, yet, that if they are not so paid, and the master has returned, they may be recovered here from the owner, or they will be entirely lost, and the law violated with impunity. 2 Story's Laws, 883. 884. Abbot Ship. 146. 240. Emerson v. Howland, 1 Mason, 45. Spurr v. Pearson, 1 Mason, 104. Orne v. Townsend, 4 Mason, 541. Kimball v. Tucker, 10 Mass. Rep. 192. Reid v. Darby, 10 East, 143. Sheriff v. Potts, 5 Espinasse, 96.

Grinnell for the respondent.

When this libellant was discharged, the captain and the consul took every means to procure for him a speedy return to his own country. His discharge was the result of a misfortune, not of any unjust or unkind act. He has arrived safely here. Is the owner of the vessel, who has already lost so much, to pay this additional charge, namely, forty-two dollars for every seaman, whom nothing but shipwreck, the act of God, prevented him from longer protecting? If so, the provision of the law must be unquestionable. But it is not. 1. It does not extend to the owner, but is confined to the master; the payment is to be made by him, and properly so, for he is the person who discharges the seamen, his is the act which makes the payment necessary, it is one over which the owner has no control. 2. It provides that the payment is to be made to the consul, not to the seaman. It is part of a general system by which funds are provided abroad for destitute seamen. If the master neglected his duty, it was the fault of the consul, who could have compelled its performance on the spot. If the master and the consul both omitted to comply with, or enforce the law, the owner here, who did not cause, and could not prevent such

omission, is not to be punished. 3. It never was intended to apply to a case like this. The law regards only cases of voluntary discharge; this was involuntary, owing to the inability of the vessel to perform the voyage. Two events are provided for, the sale of an American vessel in a foreign port, and the discharge abroad of an American seaman with his own consent; in these cases, and in these only, the law interposes to protect the seaman from his own imprudence. To exact additional sums of money from an American merchant who had already lost his vessel by shipwreck, never was contemplated; to make him pay additional wages, when all his freight, the mother of wages, was lost, never was intended. Now the evidence is conclusive, to show that this was not "a sale of the vessel," for she had become a mere wreck; nor was it a discharge of the libellant "with his own consent," for he refused the terms offered by the master and consul. It was in fact a termination of the contract by sheer and absolute necessity; by an act of providence, which no human prudence could foresee or prevent. Abbot Ship. 444. The Saratoga, 2 Gallison, 164, 181. The United States v. Mitchell, 2 Washington, 478. Ogden v. Orr, 12 Johnson, 143. Van Beuren v. Wilson, 9 Cowen, 158. Hamilton v. Mendes, 2 Burrow, 1198. 1209.

Judge Hopkinson delivered the following opinion:

By the third section of the act of congress of 28th February, 1803, (2 Story's Laws, 883,) it is enacted "that whenever a ship or vessel belonging to a citizen of the United States shall be sold in a foreign country, and her company discharged; or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master to produce to the consul, the list of the ship's company," and "to pay to such consul, for every seaman three months' pay over and above the wages which may be due him; two thirds thereof to be paid by such consul to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other

remaining third to be retained to create the fund" therein named.

The object and policy of this enactment seems to be, not only to provide the means of the return of every American seaman to the United States, but to induce him to return, by making his engagement on board of a vessel to return to the United States, a condition upon which he is to receive his two thirds of the three months' wages paid to the consul. By the plain terms of the law, too, this money is to be paid by the master to the consul in the foreign port, who is made the trustee or agent of the United States, as to one third part of the amount paid to him, and of the seaman as to the other two thirds; and it is his duty to account to each of these parties for their respective proportions. It is also to be observed, that the part reserved for the United States is appropriated, by the act, to the "purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, and may be in a foreign port." The act further directs, that the sums thus retained for this fund, shall be accounted for with the treasury every six months.

Thus it would seem, that not only the terms of the law, but the objects to be attained by it, to wit, the return of American seamen to their country, and their maintenance when found destitute in a foreign port, all require that this money shall be paid to the consul in the foreign port, where the seaman is discharged, and that no other payment or obligation to pay is recognised or created by the act.

I confess that this would be my opinion if the question came up in this case for the first time, and of course I should consider that no recovery of this additional sum could be had, either from the master or the owner of a vessel here. The court would make itself a volunteer unauthorised trustee of a public fund, without any legal direction for the disposition of it. The case of Emerson v. Howland (1 Mason 45,) reported

and recognised in Judge Story's edition of Abbot on Shipping, (page 146,) has been cited to prove the right of recovery here from the owners of the vessel. It was a suit in the admiralty against the owners of a ship for subtraction of wages. The facts were that the seaman was shipped at Norfolk on a voyage to Liverpool, and thence to one or more ports in Europe, and back to the United States. She arrived at Liverpool, and sailed for Archangel, and while on that voyage was captured by a Danish cutter. The ship was finally restored; but ten days before the restoration, the captain discharged all his crew, under the pretence that they refused to remain any longer, and either had deserted or intended to desert. The ship did not pursue her voyage to Archangel, under the pretence that a suitable crew could not be obtained. She took in a cargo and went to Ireland, and thence to Liverpool, and from thence returned to the United States. The libellant received his discharge with the rest of the crew in Denmark, and the captain gave him a due bill for the amount of his wages up to that time. The claim was for wages to the time of the actual return of the ship to the United States, which was the termination of the voyage described in the articles. On the other side it was contended that the seaman was entitled to wages only to the time of his discharge. By this statement of the case, it appears that no question under the act of congress of 28th February, 1803, was involved in it. Nothing was demanded under that act; the circumstances did not bring it within the act. It does not appear that the seaman was discharged by his own consent. It is said that the captain discharged the crew under the pretence that they would desert. The expression implies that this was not the real cause, and without it there is no pretence of any consent on the part of the seamen to their discharge. This charge of insubordination, at least so far as it concerned the libellant, was repudiated by the certificate given by the captain at the time of his discharge, in which he speaks with approbation of his conduct, and states that he has been captured, and was under the necessity of discharging him. This necessity in

the common understanding of the language, would be referred to the capture, and not to any menace of desertion on the part of the seaman. In this respect, therefore, that case did not fall under the provisions of the act of congress; nor did the claim of the libellant so consider it. The three months' additional wages were not demanded, but only what was considered to be due under, and by virtue of the contract, to wit, full wages to the end of the voyage.

On the conclusion of the argument by the counsel of the parties, Judge Story, before he decided the case, which he reserved for further consideration, threw out this observation; "In future, where seamen are discharged in a foreign port, I shall decree against the owners the whole of the three months' wages, authorised and required to be paid by the statute of 28th February, 1803. The practice has heretofore been to allow only the two months' wages which belong to the mariner. But the owner ought not to be in a better situation than if he had complied with the terms of the law; and it is the duty of the court to see that it is enforced. The additional month's wages will not, however, be paid over to the mariner, but retained in the registry for the use of the United States, to be applied according to the regulations of the statute." There is certainly not the cautious discrimination in the terms of this declaration, struck off in the course of a trial, which characterises the deliberate opinions of this learned judge. He says, "whenever a seaman is discharged in a foreign port," he will give the additional three months' wages, two of them to the seaman, and the third to the United States. But assuredly he would inquire whether the discharge is such a one as is expressly described in the act of congress; that is, "with the consent of the seaman." He would not, as his language imports, in every case of a discharge in a foreign port, without inquiry for what cause it was done, apply the remedy of the act of congress, which is given only to a discharge of a specified description, leaving the seaman to his ordinary rights and remedies for a discharge of another description. The judge says, that in a future case he would so

decree; but no such decree appears to have been made by him, unless it may be found in the manuscript case in the Massachusetts circuit court, referred to in Abbot on Shipping, but not reported. In a note to his last edition of that work (page 443,) the judge again repeats his opinion, or declaration, made in the case of Emerson v. Howland. He adds; "but it has been decided that a seaman cannot recover, in a suit at common law, the whole or any part;" and he cites the case of Ogden v. Orr, (12 Johnson, 143.) Before I turn to that case I will remark, that I presume there can be no difference between the duty of a common law and an admiralty court, in the construction of an act of congress. The object of both courts must be the same, to understand the law truly, as it was intended by the legislature, and to execute it according to that understanding.

The case of Ogden v. Orr, in the supreme court of New York, was an action of assumpsit, for wages claimed by the plaintiff, as a seaman, and also for a breach of the shipping articles. The plaintiff had been discharged from the ship at Lisbon, and his demand was founded on the act of congress we have referred to. The plaintiff had left the vessel voluntarily, and with the master's consent, and had received his wages to the time of his discharge. The inferior court had given judgment for the plaintiff; but the supreme court thought there was an error in the construction of the act of congress. After reciting the statute, the court proceeds; "Assuming that the plaintiff below was discharged with his own consent, the question is, whether he can maintain an action for his two thirds of the three months' wages required, in such cases, to be paid by the master. The act directs it to be paid to the consul; it creates no obligation on the master to pay it to the seaman; and the policy of the law seems to have been, that the money shall pass through the hands of the consul, who is made, in some measure, the guardian of American seamen in foreign parts, for the purpose of protecting their rights, and relieving their wants. This three months' pay was intended as a kind of penalty, and to create a fund for a benevolent purpose. It is likewise taking from the consul a com-

mission to which he is entitled by the act. Besides, this is a suit against the owner, and not against the master of the vessel." This judgment of the supreme court of New York was rendered in January, 1815; the dictum of Judge Story was delivered in May, 1816. It is probable that the case of Ogden v. Orr was not then known to the circuit court of Massachusetts. It does not appear to have been noticed either by the counsel or the court; and the volume containing it was not published until some time in 1816.

With these views of the subject it would be my duty to dismiss this libel, if the case did not present itself to the court under the protection of a judge who is entitled to high respect from every court, and especially upon a question of the description of that now under consideration. I am always unwilling to disturb such opinions, although they do not come in the shape or with the authority of judicial judgments. It is very desirable that an uniformity of decision, particularly on the construction of acts of congress, should prevail in the courts of the United States; and to this object I would yield much of my own opinions. If the dictum of Judge Story may be thought to have been hastily thrown out, yet we find he holds to it in the notes in his edition of Abbot on Shipping, already cited, (pages 145 and 443.) I cannot but hesitate to oppose myself, without a more deliberate examination of the question, to this learned and enlightened judge, and therefore have reluctantly determined to sustain this suit; but, at the same time, I shall not hold myself to be bound by this decree, if at any future time, on a more full argument, or by my own more mature deliberation, I shall find my own impressions of the law to become deeper and stronger.

As to the facts of the case, it is clear to me that no such necessity existed for breaking up the voyage and discharging the crew, as will take from it the character of voluntary discharge. The vessel was not greatly damaged by going on shore; or, certainly not so much so but that she might have readily been put in a condition to proceed on her voyage.

DECREE. That the three months' wages be paid by the respondent; two thirds thereof to be paid to the libellant, JOSEPH POOL, and one third for the use of the United States, with costs.

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GABRIEL SMITH

*v.*

THE SLOOP PEKIN, DAVID DAVID NOW MASTER.

A contract for wages on a voyage between ports of adjoining states and on the tide water of a river or bay, is within the jurisdiction of the District Court, and may be enforced by a suit *in rem* in the admiralty.

IN the month of March, 1829, Gabriel Smith shipped as steward on board the sloop Pekin, to perform a voyage from the port of Smyrna in the state of Delaware, to Brandywine, Wilmington, and Philadelphia, and thence to run to and fro at the wages of eight dollars and fifty cents a month. Under this contract he continued performing the voyage referred to, until the month of December following. At that time being at the port of Smyrna, where the sloop was moored, and the cargo unladen, Gabriel Smith was discharged from the vessel by the master, without payment of the wages then due to him.

On the 22d December, 1830, the vessel being in the port of Philadelphia, Gabriel Smith filed his libel in this court against her, in order to recover the wages thus due; praying process of attachment, and also for the condemnation and sale of the vessel, her tackle, apparel, and furniture.

On the 7th January, 1831, Jacob Raymond, owner of the sloop, for plea to the said libel set forth, "that the said sloop at the time when the libellant shipped on board of her, was not destined or bound for, nor has ever proceeded on any voyage

on the high seas or within the jurisdiction of this court, but then was and ever had been employed as a river craft, in plying to and fro between Smyrna, in the state of Delaware, Brandywine in the same state, and Philadelphia, in the state of Pennsylvania, being an adjoining state, and that the sloop is of less than fifty tons burthen. That by the laws of the United States it doth not pertain to this honourable court, nor is it within their cognisance to interfere or hold plea respecting the claim of the said libellant."

On the 28th January, 1831, the case came on to be heard before Judge HOPKINSON on these pleadings. It was argued by I. NORRIS for the libellant, and LOWBER for the respondent.

I. NORRIS for the libellant.

The question is, whether a vessel running on tide waters, from a port in one state to a port in another state, is subject to the admiralty jurisdiction. The ninth section of the act of congress of 24th September, 1789, gives jurisdiction to this court, "of all civil causes of admiralty and maritime jurisdiction." A suit for a seaman's wages is such a civil cause. Shipwrights are entitled to admiralty process; and so are seamen for services even if not done at sea. This cause of action, therefore, is one coming within the jurisdiction of this court. So also is the place where it occurred. Admiralty jurisdiction extends over all places where the tide ebbs and flows; and this gives jurisdiction rather than the nature of the contract. Navigable rivers, where the tide ebbs and flows, fall within these limits. A coasting voyage from one port to another of the same country is also within them, as much as if it had been on the high seas. All coasting voyages must be excluded from this jurisdiction or all admitted; it is impossible to draw any line between those that are in the tide rivers and bays, and those that are along the open coast. 1 Story's Laws, 56, 105. Abbot's Ship. 108, 476. 1 Holt's Ship. 463. United States v. The Sally, 2 Cranch, 406. United States v. The Betsey, 4 Cranch, 443. Gibbons v. Ogden, 9 Wheaton, 195. Steamboat Thomas Jefferson, 10 Wheaton, 428. The Jerusalem,

2 Gallison, 347. De Lovio v. Boit, 2 Gallison, 437, 471. Stevens v. The Sandwich, 1 Peters Ad. Dec. 233. Shuster v. Ash, 11 Serg. & Raw. 90. Hook v. Moreton, 1 Lord Raymond, 397. Mills v. Gregory, Sayer, 127.

Lowber for the respondent.

The jurisdiction claimed is larger than was ever before pretended for an admiralty court. In its practical effects, it will, if sustained, lead to great inconvenience and manifest absurdities. It will embrace all ferry boats, plying across the Delaware between Pennsylvania and New Jersey; it will include the coal boats, and other craft of that sort, navigating the Schuylkill.

The real question is, whether or not this contract is a maritime contract. It is not such a one as maritime courts have hitherto claimed control over. No court of admiralty has ever yet assumed a jurisdiction over wages for a voyage from one port to another in the same country, unless, in performing the voyage, the vessel went to sea, or passed along the coast out at sea. A voyage from Philadelphia to the state of Delaware, is certainly not a foreign voyage; it is not so as to matters of commerce and its regulations; nor is it so as to the contracts necessarily made for its prosecution. Sergeant Const. Law, 199. Abbot's Ship. 476, 542. 1 Holt's Ship. 438. Parry v. The Peggy, 2 Brown, Civ. & Ad. Law, 533. De Lovio v. Boit, 2 Gallison, 406. Plumer v. Webb, 4 Mason, 380.

I. Norris for the libellant in reply.

A service performed in a bay or navigable tide river is a maritime service, and certainly in England it has been decided that seamen may sue for wages for such service, in the admiralty courts, especially when the voyage is a coasting voyage. The act of congress, of 16th July, 1790, is not applicable to coasters; it alludes only to foreign voyages, or those from one state to another, other than adjoining states. The district courts of the United States possess the jurisdiction of admiralty courts to the fullest extent; and if this case would fall within it as exercised by them abroad, it is within it as authorised here. The refer-

ence to ferry boats does not apply, because they are not engaged in a maritime service; theirs is not a maritime contract. Coasting vessels pay hospital money by the act of 16th July, 1798; and seamen on such voyages are in all respects on a footing with those engaged in foreign voyages; they should, therefore, enjoy all the same privileges. 1 Story's Laws, 554. Jennings v. Carson, 1 Peters Ad. Dec. 10. Gardner v. The New Jersey, 1 Peters Ad. Dec. 223.

Judge HOPKINSON overruled the plea to the jurisdiction.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

MAY SESSIONS, 1831.

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THOMAS KNAGG
*v.*
SAMUEL GOLDSMITH, MASTER OF THE BRIG ANN AND LEAH.

1. Where a vessel arrives at the last port of delivery and is moored at the wharf, if a seaman leaves her before the discharge of the cargo, a deduction from his wages is allowed, but not a forfeiture of the whole.
2. To subject a seaman to the forfeiture of his wages according to the provisions of the act of 20th July, 1790, the entry in the log book is indispensable, although the absence was permanent, and although it occurred after the vessel arrived at the last port of delivery.

ON the 15th July, 1831, this case was argued by GRINNELL for the libellant, and NEWCOMB for the respondent.

On the 22d July, Judge HOPKINSON delivered the following opinion:

The important facts of this case are these. The libellant, Thomas Knagg, on the 3d March last, shipped at Philadelphia, as a mariner on board the brig Ann and Leah, on a voyage from Philadelphia to Attakapas, in the state of Louisiana, and back to Philadelphia, at the wages of fourteen dollars a month. He performed the voyage, not without some exceptions to his qualifications, but doing his duty as a mariner "as well as common." The brig returned to Philadelphia on the 26th June, where she has since discharged and delivered her cargo. On

her arrival she was made fast to another vessel, lying at the wharf, the brig being at that time unable to get in. After she was thus fastened, with sufficient safety, the libellant, being in a state of intoxication, went on shore, or was put on shore by the captain, who directed him to go to a boarding house, as the rest of the crew had done, but with no intention of discharging him, or giving him permission to leave the brig until she was brought along side of the wharf and unladened. He did not return to the brig, nor give any assistance in discharging her cargo.

The libellant now claims his full wages, and the balance agreed to be due is thirty-one dollars and thirty-three cents, provided he has not made himself liable to any forfeiture or deduction by leaving the vessel. On the part of the respondent, it is alleged, that by his desertion and neglect, or refusal to do his duty, he has forfeited all his wages then due.

It will be seen at once that this case presents the question, whether it is or is not the duty of a seaman, under his contract with the master of a vessel, to remain with her until her cargo is discharged, and to give his assistance in discharging it; or whether the obligations of his contract terminate, as the libellant now contends, on the arrival of the vessel at the last port of delivery, and after she is there moored in safety.

The libellant relies, for the support of his law of the contract, on the decision of Judge Peters in the case of Swift and others v. The Happy Return. (1 Peters Ad. Dec. 253.) The judge there says; "As to mariners shipped for the voyage, unless specially obliged by the articles, as they are in many ports of the United States and elsewhere, it is questionable whether or not they are bound to unlade the ship after the voyage is ended, when the vessel has arrived at her last port of delivery and is there safely moored." If the judge be correct in his opinion, which I do not affirm, of the time when, legally speaking in reference to this contract, the voyage is ended, it is nevertheless clear, that in his case the sailors were shipped generally, "for the voyage," and that there was no special ob-

ligation, in the articles, to enlarge the period of their duty, or to extend their service to another object. When such an obligation is introduced into their contract, it surely forms as reasonable and valid a stipulation as any thing contained in the articles. This special obligation is found in the articles before us; and may have been introduced here in conformity with the practice in many other parts of the United States, and in consequence of the decision of Judge Peters, in the case referred to. It is expressly stipulated in these articles, that the seamen shall not "go out of the said vessel on board any other vessel, or be on shore, on any pretence whatsoever, until the above said voyage be ended, and the said vessel be discharged of her loading, without leave." In another part of his opinion, Judge Peters says; "in this port it is the general custom to hire others than the mariners to lade and unlade vessels. The merchants find it more for their interest to do so, than to depend on the mariners, who are particularly ungovernable after the voyage is ended." As, however, the judge was of opinion that the voyage was ended on the arrival of the ship and her safe mooring, and that "the end of the voyage, and the discharge of the cargo, are separate and distinct subjects," the alleged custom of the port of Philadelphia was not necessary to sustain the decree in that case. If, however, as in our case, the seaman expressly obliges himself not to leave the vessel, and to continue his service to her, until she is "discharged of her loading," he cannot protect himself for the breach of this part of his contract, either by the general principles maintained by the judge, or the custom of this port.

The case of Edwards v. The Susan, (1 Peters Ad. Dec. 165,) relates only to the period from which the ten days are to be computed, before a seaman can commence a suit for his wages. In this the rule taken by the judge appears to me to be the true one.

It is my opinion, in this case, that the libellant left the brig, and the duty he owed to her, before he was entitled to do so by the terms of his contract, and that he did so "without leave

first obtained from the master or commanding officer." What penalty or forfeiture has he made himself liable to by this misconduct? On the one side it is said, that he has forfeited all the wages due to him at the time of his desertion: on the other, that he is bound only to make an adequate compensation for his default to the owner of the vessel. In the case of Swift v. The Happy Return, already referred to, the judge, after declaring that he thinks the seamen are not bound to unlade the ship, says; "should it be deemed an additional duty to their common maritime employment to unlade the cargo, they are only answerable in damages for neglect or refusal." He inclines, very properly, against the severity of forfeitures of all the wages for such delinquencies, and very truly says, they "have been called for, on this account, most frequently, when old quarrels at sea, or recent animosities, or differences about accounts have embittered the parties." When ample remuneration can be given for an injury, without such extreme visitations, and they are not required by indispensable discipline, they should be avoided, and the milder and more just redress resorted to. The irregularities and passions of seamen should be held under a wholesome restraint, not without some allowance for their peculiar character and habits. Judge Peters observes that, in insisting upon extreme penalties against them, "the law is too often, in violation of its principles, spirit and system, considered and applied to as a means to gratify the passions."

In the second article of the seventh title "of mariners," in the second book of the Ordinances of Louis XIV, it is said; "the sailor engaged for the voyage shall not quit the vessel without leave in writing, until the voyage is finished, and the vessel moored at the wharf, and entirely unladen." This is the language of the ordinance. Valin, commentating upon this article, (1 Valin, 532,) says, "the engagement being for the whole voyage, the officer or sailor is obliged to accomplish it, and cannot depart without leave until the voyage is ended; that is to say, until the ship is entirely discharged, and moored at the wharf, or put in a place of safety." Further, this learn-

ed jurist says; "but it often happens that mariners, on the arrival of the ship, go on shore and neglect to return to assist to discharge and unrig the vessel. The proceeding against such men, and the most proper means of correcting them, are to get labourers in their place, at their cost; and what is paid to these labourers is afterwards taken from the wages of these sailors. Nothing is more just, for otherwise, all the mariners would successively abandon the vessel."

I think it clear that the respondent cannot insist upon the forfeiture of all the wages of the libellant, on the general principles of the maritime law; nor, I may add, on the principles of retributive justice. It is, however, claimed under the provisions of the act of congress of 20th July, 1790, inserted in the shipping articles, and making a part of the contract. The clause relied upon is as follows; "If any seaman or mariner, who shall have subscribed such contract as is herein before described, shall absent himself from on board the ship or vessel, in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the log book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels, which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel; and he shall, moreover, be liable to pay to him or them all the damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place." It is needless to say that this is a highly penal act, and should be construed strictly upon those who seek to enforce it. What is the argument by which the respondent would bring it to bear on the libellant, and ex-

act from him the extreme forfeiture of the act, although he has himself not complied with the requisitions of the act, by making an entry in the log book of the desertion he would thus punish? He contends that such an entry was not necessary in such a case; that the entry is required only when the absenting seaman returns to his duty within forty-eight hours, but that when he is absent for more than forty-eight hours no entry in the log book is necessary, but the delinquency may be proved by any other satisfactory evidence. If this were the law, it would be very difficult to find a good reason for it, and I should adopt it only on a clear expression of the legislative will. Why should the act require a more precise and formal mode of proof of the shorter than of the longer absence; of the lesser than of the greater offence; for the milder than for the severer penalty? Why should it call for this record testimony, made at the time, in the nature of a day book entry, not only of the fact of the absence, but to show that it was without leave, and that the penalty would be exacted for it, in the one case more than the other? It is indispensable to the forfeiture, that the absence should be without leave in both cases. The entry, made on the day, is the proof prescribed by the law to show not only the duration of the absence, which regulates the extent of the penalty, but also that it was without leave, and would be punished according to the act. The seaman is thus secured from the danger of having the penalty claimed, when perhaps, at the time of his absenting himself, no objection was made to it, although express permission may not have been given, and no intention was entertained of visiting him with the penalties of the law; his fault being afterwards resorted to when, in the language of Judge Peters, "old quarrels at sea, or recent animosities, or differences about accounts have embittered the parties."

These reasons, which have been judicially declared to be the reason and spirit of the law, apply as fully and forcibly to an absence for a longer period than forty-eight hours, as to one within that time. In the phraseology of the act I find nothing to warrant the distinction; certainly not expressly, nor as I

think, by any necessary, or reasonable implication. It is enacted, that in order to incur either forfeiture; 1. The seaman shall absent himself from the vessel without leave of the master, or officer commanding on board. 2. The mate, or other officer having charge of the log book, shall make an entry therein of the name of such seaman, on the day on which he shall so absent himself. Thus much for the offence and the evidence directed by the law which creates it, to be preserved of it, applying, in terms and in spirit, generally and equally, to all cases of absence to be punished under the act. They must be without leave, and they must be entered, on the day, in the log book. We then have the graduation of the penalty for such absences. In these a regard is had to their duration, but no change made as to the testimony by which they are to be proved. "And," says the act, "if such seaman or mariner shall return to his duty within forty-eight hours, then such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels." But there is no intimation that the entry in the log book may be dispensed with, or supplied by other satisfactory evidence in the latter case any more than in the former. All absences, to incur the forfeitures of the act, must be without leave, and must be recorded in the log book on the day they occur. No distinction is made, in these respects, between an absence for one period or another. The difference is only in the penalty, which is reasonable and intelligible.

This would seem to me to be very plain and unquestionable, both in the spirit and words of the law, if a different construction had not been supported by a high authority. It is found in the case of Webb v. Duckingfield, (13 Johnson, 390.) That was an action brought in a common law court, by a seaman on board the Maria to recover wages for a voyage from Savannah to Rotterdam or one more port in Europe, and from thence to her port of discharge in the United States. The plaintiff per-

formed his duty during the voyage and until the vessel arrived in New York, her last port of discharge, and was safely moored in port, when he left her, refusing to remain on board or to assist in discharging the cargo, though he and the rest of the crew were requested to remain. The plaintiff never returned to the vessel, and the master was obliged to hire persons to discharge the cargo. The mate, on the day the plaintiff left the vessel, and on each day till the cargo was discharged, made the following entry in the log book: "all the crew absent without liberty." In this case, Judge Van Ness delivered the opinion of the court, and said; "The determination of this question has nothing to do with the mate's making an entry in the log book of the desertion. Such entry, if it had been made, would have been prima facie evidence of the fact; but as it is fully proved by other testimony, that is sufficient without the log book. The reason for making these entries in the log book are accurately stated by Judge Peters, in the case of Malone v. The Mary (1 Peters Ad. Dec. 139,) and have no application to this cause." Judge Van Ness goes on to say that, not only by the act of congress, but from "the reason and propriety of the thing, the contract with a seaman continues in force until the cargo is finally discharged, and if he leaves the ship without justifiable cause, before that is accomplished, he has no right to recover any part of his wages." As to the reason and propriety of the thing in regard to the whole forfeiture, I have already given my reasons for believing they require no further satisfaction, for this violation of the contract, than a full and fair indemnity to the owner of the vessel; and Valin, above referred to, sustains my opinion on this point. Nor has Judge Peters ever considered that there is any thing in the act of congress by which the contract of a seaman continues in force, until the cargo is fully discharged. His opinion was the reverse of this; and he thought the voyage did not so continue, unless specially stipulated in the articles. It is admitted by Judge Van Ness that Judge Peters has accurately stated the reasons of the act of congress for requiring the entry of a desertion in

the log book. By turning to the case of Malone v. The Mary, which is referred to by the court of New York, we shall see that Judge Peters differs altogether from that court as to the nature and necessity of the entry in the log book. The admiralty judge thought this evidence not only prima facie but indispensable, without which the forfeitures given by the act, could not be claimed; that it could not be supplied by other testimony: and that without it no other testimony could be judicially sufficient. This has always been the construction of the act in this district. We must observe, that the reasons of judge Van Ness for admitting other evidence, and dispensing with the log book entry, apply equally to an absence within, or for more than forty eight hours. He makes no distinction and I presume intended none.

In the case of Malone v. The Mary, Judge Peters says; "The entry in the log book is made by the act of congress legal evidence of the time of coming on board, and of the absence occasioning the mulct on the delinquent seaman;" again, "the compulsion on the mate or keeper of the log book to make the entry was introduced to control the general rule of law, that receiving a seaman on board, who had committed an offence, amounts to a release or pardon;" and further, "the entry in the log book is necessary to show that no release was intended, as well as to ascertain the fact with greater accuracy." This last reason, and indeed the other also, applies to every absence for more or less than forty-eight hours. The judge adds; "in case of desertion, he had always considered the entry in the log book evidence of the fact, but not conclusive, though indispensably necessary." There is nothing in this case to warrant the suggestion that Judge Peters thought that in any case of absence, of any duration, the entry in the log book could be dispensed with, or other evidence satisfy the law, when the penalties of the act were claimed on account of it. He considers the entry indispensably necessary in every case, whatever other testimony there may be of the fact. It is so far prima facie, that it is not absolute and conclusive; it may be

met and disproved by the proof, but can never be dispensed with.

In the case of Thompson v. The Philadelphia (1 Peters Ad. Dec. 210,) the same judge says, in the same sense; "the entry in the log book is only prima facie evidence."

In the case of Jones v. The Phœnix, (1 Peters Ad. Dec. 201,) the same judge says; "the log book is by act of congress, made legal evidence in proof of desertion, but it is not incontrovertible and conclusive;" but he never takes back or qualifies his opinion that it is "indispensably necessary," and so it has always been considered in this court.

We have a stronger case to show, if it could be doubted, that Judge Peters never intended to be understood to maintain the doctrine, that the entry in the log book was not required on a claim of a forfeiture of wages under the act of congress, or that he supposed there was any difference in this respect between an absence for more or less than forty-eight hours; between a forfeiture of the whole or a part of the wages due. In the case of The Phœbe v. Dignum, (1 Washington, 48,) there was an appeal from the district court, Judge Peters having decreed to the appellee his wages as a seaman on board the said schooner on a voyage from Philadelphia to Jamaica and back. The answer admitted that the libellant had entered as a mariner for that voyage, but insisted that he had, while at Jamaica, absented himself from the vessel, without the consent and against the will of the captain, for four days, which, under the act of congress, amounted to a forfeiture of his wages up to the time of such absence. The case was heard on the bill and answer. Judge Washington delivering his opinion on the appeal, says, "absence for more than forty-eight hours, without leave of the master, or officer commanding on board, is a forfeiture of all the wages due at that time, provided the officer having charge of the log book shall make an entry therein of the name of such seaman, on the day on which he shall so absent himself. The reason of this is obvious; if such entry be made it repels any presumption that such consent took place, or that the forfeiture

was intended to be waived. If no such entry be made, it is to be presumed that the absence was not injurious, and was not objected to. As it does not appear in this case that any such entry was made, the appellee is entitled to his wages. The sentence of the district court is affirmed, with costs." A case could not occur more direct and strong to the point we are considering, to wit, the necessity of the log book entry. The answer stated a desertion for more than forty-eight hours, without the consent, and against the will of the captain, and the truth of this allegation was not denied; it was an admitted fact in the case. Yet this admission of the libellant was not thought enough to dispense with the evidence required by the act; or to be a sufficient substitute for it.

In the case of Herron v. Schooner Peggy, (Bee, 57,) the court adopts the same principle I have assumed in this case. There was an entry in the log book, but not made according to the directions of the act of congress. The judge says; "As to the remedy under the act, it was waived by the defective entry in the log book. Nevertheless, I think the conduct of this man blamable, and that he ought to be mulcted." A deduction was made, accordingly, from his wages.

On the whole, it is my opinion, that the libellant's leaving the brig, at the time and in the manner he did, was a desertion of his duty, and a violation of his contract, by which he obligated himself not to leave her until the voyage was ended, and she was discharged of her loading. That as a forfeiture of all his wages for this delinquency is, and can be claimed, only by virtue of the act of congress; and as that act prescribes that an entry of such desertion shall be made in the log book; and as no such entry was made in this case, the forfeiture claimed cannot be decreed.

The owner of the vessel is, nevertheless, entitled, independently of the act of congress, to a compensation, to be deducted from the wages, for the loss or injury he has sustained in consequence of the libellant's default in his duty, and breach of his contract. No proof has been given of the precise amount of this loss, but

it is certain that the service of this man in unloading the brig must have been supplied by hiring another in his place, or by retaining the rest of the crew a longer time. This may be reasonably estimated at five dollars, which is ordered to be deducted from the sum of thirty-one dollars and thirty-three cents, leaving a balance to be paid to the libellant of twenty-five dollars and thirty-three cents.

DECREE. That the respondent pay to the libellant, THOMAS KNAGG, twenty-six dollars and thirty-three cents, and costs.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

AUGUST SESSIONS, 1831.

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JOHN MAGEE, ALEXANDER WARE, JOHN DUNDERFIELD, AND WILLIAM PITT

*v.*

THE MASTER OR OWNER OF THE SHIP MOSS.

1. The shipping articles must declare explicitly the ports at which the voyage is to commence and terminate.
2. Where shipping articles declare the voyage to be "from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia," it is no violation of the contract with the seamen, for the master to proceed from South America to Europe, and affords no justification to them for leaving the vessel.
3. To subject a seaman to the forfeiture of his wages for desertion, according to the provisions of the act of 20th July, 1790, the prescribed entry in the log book is indispensable.
4. Where the departure of the seamen from a vessel, before the termination of the voyage, is involuntary on their part, or with reasonable cause, or with the apparent assent of the master, they do not forfeit their wages.
5. To justify seamen for leaving a vessel, before the termination of the voyage, on account of the cruelty of the master, it must be apparent that they could not remain without extreme danger to their personal safety.
6. Where a seaman is imprisoned by the authorities of a foreign country for a violation of its laws, the costs and charges may be deducted from his wages; but not so when he is imprisoned at the instance of the master of the vessel.
7. The imprisonment of a seaman in a foreign gaol, at the instance of the master of a vessel, is only to be justified by extreme necessity.

THE libellants were seamen on board the ship Moss. They shipped at Philadelphia, as appeared by the articles, on the 2d

January, 1830, on board the ship Moss, at the wages of fifteen dollars a month, "on a voyage from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia, unless sooner discharged." The vessel sailed on the 3d January, for Buenos Ayres, where they arrived about the 5th March. All the persons on board were put on an allowance of three quarts of water each per day, from the 22d February until they made the land. They sailed from Buenos Ayres, on the 27th June, for Havanna, where they arrived on the 3d September. All the persons on board were put on an allowance of one pound of bread each per day, from the 8th July until they reached the Havanna, but there was plenty of potatoes, vegetables and meat given them. The vessel remained at Havanna until the 30th December, 1830, when she proceeded to Marseilles, thence to Pernambuco, and thence back to Philadelphia, where she arrived on the 10th October, 1831. On the 19th December, 1830, the libellants left the vessel at the Havanna, having first made known their intention so to do to the American consul, without having received the wages then due to them, and without any assistance from the captain to enable them to return to the United States.

The libellants declare that during the time they remained on board the vessel, they were not allowed a sufficient quantity of provisions, and were treated with extreme cruelty; during the time they were at the Havanna, Ware and Dunderfield, two of the libellants, were confined in gaol, at the instance of the captain; and they finally left the vessel, because they discovered that the captain was about to carry them from the Havanna to an European port, contrary to the contract as contained in the shipping articles, and also because of the ill treatment they had experienced.

The respondent, Edmund Fennell, who was the master of the vessel, denies in his answer that the libellants were obliged to leave her in consequence of ill treatment or abuse, or because the provisions were insufficient or bad. He alleges

that when the two seamen, Ware and Dunderfield, were confined in prison at his instance, it was done with the assent of the American consul, on account of their drunkenness and improper conduct, and on one occasion, when he found that Ware had been put in gaol by the Havanna police, he obtained his discharge and paid the costs, together with the expense of medical attendance which he afterwards required. He further alleges that Magee, Ware and Dunderfield deserted from the vessel; that their desertion was regularly entered in the log book; and that other seamen were hired in their places at higher wages.

The account annexed to the libel claims full wages from the time of shipment until the libellants left the vessel; additional wages for the time they were on short allowance; and their expenses from the day they left the vessel till they reached Philadelphia. The respondent, besides alleging an entire forfeiture on the ground of desertion, claims allowance for various sums advanced, for the excess of additional wages paid to seamen shipped in their places after they left the vessel, and for the expenses of their several imprisonments at the Havanna.

The libellants were severally examined for each other, to support the allegations of the libel. On the other side, for the respondent, the supercargo of the vessel from Havanna, and the first mate of the ship, who also joined her at Havanna, and other witnesses were produced; their testimony contradicted, or greatly weakened the evidence of the libellants, especially on the subject of the provisions. There was rice on board, which was occasionally served out, also potatoes, and generally the stores of the ship were good, indeed of a superior quality. The accounts also of the severity of the captain were softened and modified.

On the 12th November, 1831, the case came on for hearing before Judge Hopkinson. It was argued by C. Ingersoll for the libellants, and J. S. Smith for the respondents.

C. Ingersoll for the libellants.

There has been such a deviation from the voyage contracted

for as discharges the seamen from the contract. The words "other port or ports, backwards and forwards," intend only ports in South America. The voyage was "to South America, or, (not 'and,') any other ports." Having gone to Buenos Ayres was a full performance of the articles. "Backwards and forwards," means between South America and Philadelphia. "Any other port or ports," is as general as "elsewhere;" they mean the same thing. By the first section of the act of congress of 20th July, 1790, the articles must declare the voyage and terms of shipment. This was to prevent uncertain and indefinite contracts, or terms of service; to guard and protect seamen against their own heedlessness in signing articles. Can seamen, under the general description of port or ports, be kept indefinitely, and carried to any part of the world? There is no limitation here even of time. Nor is a voyage to Marseilles either subordinate to, or consistent with, the voyage described in the articles. 1 Story's Laws, 102. 1 Hall's Law Journ. 209. Brown v. Jones, 2 Gallison, 477. The Brutus, 2 Gallison, 526. Wood v. The Nimrod, ante 83.

Was there a consent or acquiescence on the part of Captain Fennell that these men might leave the vessel? When a forfeiture of wages is insisted on, a clear case must be made out against the seamen. The seventh section of the act of congress of 20th July, 1790, invests the master with certain powers. He is bound to use these and all the means afforded by the law to recover and retain the seamen, before he can resort to forfeiture. The answer of the captain to the mate, when asked if he was about to discharge the seamen, shows either that he was conscious they had a right to go on account of the change of the voyage, or that he was willing to part with them. They did not consider themselves as deserters; neither did the captain so consider them. Will the court then so consider them? They applied to a lawyer for counsel; they appealed to the court of the place where they were, being willing to meet the captain, to have their right discussed and decided; they were sent by the court to the master of the port, and by him to the consul, who

gave them a letter to take on board the ship. The captain adopted no measures to bring them back to the ship; he never even asked them to return, although he frequently saw them. They went about at large, making no attempt at flight or concealment. All this was acquiescence in their departure; they might well so consider it. If this was not acquiescence, still there can be no forfeiture unless the captain had done all in his power to compel their return; that is a part of his duty. These men remained constantly within the sight and recall of the captain, without an effort, or even request on his part for their return. Seamen may leave the ship if the voyage is changed. Abbot's Ship. 147. 464. Ordinances of France, book ii. tit. iii. art. iv. Thorne v. White, 1 Peters Ad. Dec. 169. Crammer v. The Fair American, 1 Peters Ad. Dec. 242. Hindman v. Shaw, 2 Peters Ad. Dec. 264. Moran v. Baudin, 2 Peters Ad. Dec. 415.

J. S. Smith for the respondent.

Had these seamen a right to leave the ship at Havanna; had not the captain a right to insist on their going to Marseilles?

The forfeiture of wages does not rest on the act of congress only, but on the principles of the commercial and general maritime law. The act of congress provides penalties for two acts of a seaman. 1. Not rendering himself on board. 2. Absence without leave for more or less than forty-eight hours. If a seaman dies immediately after the vessel sails, his representatives may recover for the whole voyage, on the ground of its entirety. In the case of Sims v. Jackson, it is said, "he would have forfeited the whole, if he had left the vessel." This was not under the provision of the act of congress, but by the maritime law.

The act of congress applies to all the libellants except Pitt; as to the rest its directions were strictly complied with. The excuses set up for leaving the ship are now all abandoned, except two. 1. That the ship was going to Europe, which was not authorised by the articles. 2. That the captain acquiesced in their departure.

I. As to the construction of the articles; are they such as the

act of congress requires? The contract must declare the voyage, not describe it. It must be declared, that the seamen may know where they have a right to be discharged, and when. The terminus a quo and ad quem must be stated, but not the intermediate ports. This voyage was from Philadelphia to South America, and back to Philadelphia, omitting the intermediate ports. The words or "any other port or ports" must mean ports not in South America, which was already mentioned. Between South America and the other ports they are to go backwards and forwards, where and when required. The voyage ends on their return "back to Philadelphia," the port of final discharge. The voyage performed was in exact conformity with the articles. The ship went from Philadelphia to Buenos Ayres, in South America, thence to Havanna, a port not in South America, and thence to Marseilles, another port not in South America, thence back to South America, and thence to Philadelphia. 3 Kent's Com. 178, Abbot's Ship. 463, 468.

II. As to the acquiescence of the captain, it rests only on the fact that he saw them on shore and did not order them on board; this too rests only on the evidence of the men themselves. It does not, besides, apply at all to Pitt. The consul certainly ordered them on board; they refused to go. Suppose the captain did acquiesce; that he used no force to bring them back; was he under any obligation to do so? The deserting seaman must come himself and offer to make amends, and to go on board. The captain is not then bound to receive him if he has hired another in his place. It does not appear whether the captain saw these men on shore before or after he had hired others. Ware was put into prison by the police. Abbot's Ship. 136. 3 Hopkinson's works, 206. Whitton v. The Commerce, 1 Peters Ad. Dec. 160.

C. Ingersoll in reply.

You cannot strike out 'or,' and put in 'and,' which is necessary for the respondent's construction of the article. The men were bound to go to South America 'or' any other ports, not

'and' any other ports. All after South America is illegal and void for uncertainty. As to the necessity of an entry in the log book, the act of congress fixes the time of absence which shall be deemed to be a desertion and incur a forfeiture. The maritime law has no such limitation. The act also directs the particular mode of proof of such absence; it must be by the entry in the log book.

Judge HOPKINSON delivered the following opinion:

The libellants have presented three claims for the decision of the court. 1. For having been put on short allowance. 2. For wages up to the time they left the ship. 3. For additional pay to bring them back to the United States. The respondent rebuts these claims; the first by the denial of the charge; the second and third by charging the libellants with a desertion from the ship and their duty, by which they have forfeited their wages, and of course every claim to an extra allowance.

The fact being admitted that they did leave the vessel at Havanna, it is incumbent on them to show a good cause for doing so, or some legal justification to avoid the penalty which otherwise the law will impose upon them. As to Pitt, besides the justification he relies on, in common with the other libellants, he has a further defence against the penalty of forfeiture, in the omission to note his absence in the log book. This has been repeatedly decided to be necessary; and it must be considered to be settled, when a forfeiture of wages is insisted upon, under the provisions of our act of congress. The same law which gives the forfeiture for the absence of seamen, prescribes an evidence by which that absence shall be proved; and the owner who claims the penalty, must conform himself to the proof required of him, by the same authority which gives the penalty.

The general defence which the libellants have to avoid this penalty, is in the allegation, that the ship was going from Havanna to Marseilles, in Europe; that this was a voyage not within the contract; and that they were not bound to go with

her. That the breach of the contract was on the part of the captain in taking the ship to a place not within the terms of the articles. The validity of this defence depends upon the construction of the articles, and the obligation entered into by the libellants when they executed them. The voyage described in the articles is "from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia, unless sooner discharged." This is certainly a very awkward description of a voyage. South America is spoken of as a port to which they are to go, 'or' to any other port or ports, without any designation of them, whether in Europe or America; but they are to go backwards and forwards, where and when required. It will not do to tie down these contracts, made sometimes in a counting house, and sometimes in the cabin of a ship, to the strict rules of composition. We must endeavour to come at the true meaning of the parties, and to give the contract a reasonable construction; to take care to put upon general words a just and reasonable limitation; but not lightly to destroy and avoid the whole contract because the generality or breadth of the expressions may be in a degree uncertain, or might be used to impose an oppressive service. The court will take care that this shall not be done, and will avoid the whole if they cannot so limit it. In the present case I can see nothing unreasonable or oppressive in the construction the captain has put upon these articles. He took the ship to Buenos Ayres; he then went to Havanna, and from thence to Marseilles; he came again to a port in South America, and then terminated the voyage by returning to Philadelphia. This voyage or these voyages were strictly within the terms of the contract, and, in my opinion, no unjust or oppressive use has been made of the awkward manner in which the contract is expressed.

In the case of Wood v. The Nimrod (ante, page 83,) I adopted this principle, and I consider it to be in full accordance with the opinion of Judge Winchester, adopted by Judge Story, in the case of Brown v. Jones, (2 Gallison, 477.) In the case in which

the opinion of Judge Winchester is given (1 Hall's Law Journ. 209,) the articles specified a voyage from Baltimore "to Curracoa and elsewhere," and the respondent contended he had a right to go to St. Domingo without going to Curracoa. There he claimed to go in direct violation of a clear specification or designation of a port named in the contract, and he made the claim under the general words "and elsewhere." It is also on the face of that contract, that although the voyage commenced at Baltimore, it had no ascertained or declared termination, either as to time or place. We have the 'a quo' but not the 'ad quem.' In such a case, where, besides all this, the respondent had rested his defence on his own deception and breach of faith, the learned judge says "the term 'voyage' is a technical phrase, and always imports a definite commencement and end." In our case, this description of a voyage is fully answered; the uncertainty, such as it is, is about the intermediate ports to which the vessel might go. But even in such a case as that which the judge had before him, he would not absolutely reject the terms "and elsewhere," or destroy the whole contract for their uncertainty. He would give them a reasonable meaning and construction consistent with the contract. "They must be construed" he says, "as subordinate to the voyage specified, and can *only* authorise the pursuing such a course as may be necessary to accomplish the principal voyage." The judge explicitly says, that he would not be understood "to give any opinion that it is essential to the validity of seamen's articles, that there should be an insertion of the name of every port, to which a vessel may proceed, in the course of trade; but there must be some equivalent specification, such as to a port or ports, island or islands in the West Indies." In the present case, the person who shipped these men, swears that the articles were read to them, and they perfectly understood them, and that he has frequently shipped men to go to "port or ports" without mentioning what part of the world they were in.

The libellants have set up another justification for leaving the ship, to wit, the cruelty and barbarity of the captain to

them. Some strong evidence has been produced by the seamen in support of this part of the defence. On the other hand there is evidence which softens, but does not remove this charge against the captain. The ill treatment of sailors, by the officers under whose command they are placed, has so frequently been a subject of complaint, that courts have taken pains to explain the law so as to secure full protection and justice to the seamen on the one side, and to discourage unreasonable complaints on the other. Masters and mates of vessels are often coarse and rough men, with very little control over their tempers, and fond of using their power to its utmost. Seamen are also as often insolent, obstinate, and negligent of their duty, and require a strict hand of discipline. Both have the property of others entrusted to them, and it is the object of the law to give as much security as possible to all these interests. The seamen must submit to a reasonable discipline, and to such privations and punishments as are necessary to enforce a faithful performance of their duties, but they must, nevertheless, be treated as men, with the feelings of men, always entitled to the rights of humanity and the protection of the law. To justify the men in leaving their ship in a foreign port, or abandoning their duty at the hazard of loss or ruin to their owners, they must make out a very strong case indeed. Before they resort to this extreme remedy, the necessity for it ought to be extreme, or so pressing that a moderate and reasonable man could not resist it. They should bear much and trust for satisfaction and redress from the law, when they return home, and not, for every excess of punishment, become their own judges and avengers at the heavy expense of the innocent owners, who pay them for their service, and have trusted to their fidelity. The cases on which the courts have justified the seamen, on a plea of cruelty by the captain, in leaving the service and terminating their contract, have been where it was apparent that they could not remain with him without danger and damage to their personal safety, such as to make a dissolution of the contract necessary. No man can be bound to serve another at the peril of his life.

In the case of Rice v. The Polly and Kitty, (2 Peters Ad. Dec. 420,) there was not only a most wanton and excessive cruelty or beating of the men, but the most dangerous threats of personal injury if they continued on board. They were obliged to leave the ship at Lisbon, in the midst of the voyage and return in another vessel. The question was, whether they had forfeited their wages. The judge said; "when mariners enter into articles for a voyage, they do not thereby put themselves out of the protection of the laws, or subject their limbs or lives to the capricious passions of a master or his mate." There is no doubt much power given by the law to the master, but the law also watches the use he makes of it, and corrects any abuse of it. In that case the libellants had been cruelly beaten and abused; it was necessary to have a surgeon to cure one of them of his wounds and bruises. The captain and the mate were combined, and supporting each other in their barbarity to the men. The master once declared that "he would make them glad to jump overboard before they got to America." The whole crew left the vessel, but did not secrete themselves on shore; they demanded their wages and clothes and applied for process against the captain and mate, who promised to pay them their wages, and recorded the process. The judge did not, it is true, rely on the promise in giving his judgment, but said; "the libellants have not voluntarily deserted, but have been forced from a service in which neither the rights of humanity nor personal safety could be depended upon or even expected."

To forfeit wages there must be a voluntary departure, without reasonable cause. (Abbot's Ship. 464.) In the case of Limland v. Stephens, (3 Espinasse, 269,) which was one of seamen's wages, Lord Kenyon says; "There are reciprocal duties between masters and servants. Desertion is a forfeiture of wages; but if the captain conducts himself in such a way as puts the sailor into that situation that he cannot, without damage to his personal safety, continue in his service, human nature speaks the language—a servant is justified in providing

for that safety. After the plaintiff had been with the consul, he communicated to the defendant the wish of the consul to see him. The captain said, he would go when it suited him. Being pressed by the plaintiff to go, he beat him very severely, and threw a log of wood which hurt his foot. The plaintiff left the ship, and defendant was heard to say, that if he returned he would chain him to the mast, and bring him to Sweden." In reply to an observation made by the counsel of the defendant, Lord Kenyon said; "Is a man bound to serve at the peril of his life? Desertion is an answer to the seaman's claim for wages; but that must be a voluntary act of the seaman's, and not caused by any act of the captain. In this case, the act of the captain has made the dissolution of the contract necessary, and, in my opinion, justifiable on the part of the sailor." This case was decided in 1801. The case of the Polly and Kitty, in which the same principles were adopted, was decided in 1789, by Judge Hopkinson, then judge of the Admiralty in this district.

I have quoted these cases so much at large, to show that the cruelty must be extreme and dangerous to justify a sailor in leaving his ship and throwing up his contract. In both the cases cited, there was not only barbarous abuse of the persons of the sailors, but threats of future ill usage of a dangerous violence, which there was good reason to believe would be fully executed. The case of the present libellants has no such features; the captain was a harsh, severe man, but by no means of so brutal a character as those we have alluded to. I do not think his conduct justified the libellants in leaving the ship, or made a dissolution of their contract necessary.

The libellants having failed to justify their leaving the ship, either on account of the alleged change of the voyage described in the articles, or the ill treatment of them by the captain, they have incurred a forfeiture of their wages, unless their remaining ground of defence shall avail them, to wit, the consent or acquiescence of the captain in their departure.

The forfeiture of wages earned by a hard and perilous

service is a severe penalty, and should be exacted only on a clear legal cause. So it has been considered by the courts, and those who claim this penalty have always been required to show themselves to be clearly entitled to it by the performance, on their part, of all the requisitions of the law. The master of the vessel must throw the fault on the offending seamen; he must deal with them fairly, and honestly, and in good faith. He should neither endeavour to drive them from their duty, nor deceive and entrap these rash and ignorant men into a course of conduct, which he sees may draw upon them the loss of their wages, while they have no such suspicion. If they are really and truly acting under a mistaken opinion of their rights, and not from a dishonest or rebellious disposition, they should be undeceived, their error should be explained, or at least they should not be drawn or permitted, by an insidious silence or inattention to their proceedings, to involve themselves in the crime of desertion with its ruinous consequences. A practice of this sort upon sailors, may well be considered as a fraud, and the contriver ought not to gain by it. How were the facts of this case? The libellants left the ship under a belief that they had a right to do so; that the intention to take them to Europe was a breach of the contract, and discharged them from it. They also thought that the treatment they had received from the captain dissolved their contract. They were mistaken in both points; it was a mistake of the law of their case, and not a mutinous resolution to disregard their contract, and the law which bound them to it. Their conduct shows that they had a sincere confidence in their opinion, and were willing to bring it to a fair test. They make no flight, they seek no concealment, they walk openly about the city, they go to the wharf, they meet the captain without apprehension, they demand their wages of him, they apply to the courts of the country for redress, and in every thing they conduct themselves like men confident in their right. What was the conduct of the captain? He passed them again and again; he took none of the measures the law put in

his power to bring them back to the ship and their duty; he did not even order them to go on board. In his conversation with the mate he expressed himself doubtfully as to his intention of taking these men with him, and finally sailed away leaving them to shift for themselves.

In the case of Dixon v. The Cyrus, (2 Peters Ad. Dec. 407,) circumstances by no means as decided as these, were considered as strong evidence of consent on the part of the master to the departure of the seamen. The question of good faith is one hardly capable of direct, explicit testimony. It is an impression, an opinion derived from the whole conduct of the party. The conduct of Captain Fennell in his severe treatment of these men while they were under his authority, and his extraordinary abstinence from every attempt, even the most mild, to bring them back after they had left him, present him to my mind as a man of a violent and severe temper, and wanting in frankness and fair dealing. It seems to me that he was dissatisfied with these men, for they had certainly misbehaved themselves, and was quite willing they should leave the ship; but while he endeavoured to compel them to do so by his severity, and would lull them into security by his entire inattention to their absence, he was indulging himself in the anticipation that he would deprive them each of eleven months' wages. He was not open even to his mate. In a case in which the conduct of the captain was so calculated to deceive and mislead the men, and to induce them to believe he had no desire for them to return to the ship, but acquiesced in their opinion that he had no claim upon them to go with him to Europe; where, too, it is at least doubtful whether he did not design to mislead them for the very purpose of forfeiting their wages on a charge of desertion, I will not deprive them of their reward for services faithfully rendered for the space of eleven months. The owners of this ship have, in these services, received full value for the money demanded of them, and I see no just cause for withholding it.

There is a subordinate question in this case which must also

be disposed of. The respondent claims a credit for certain prison fees paid at Havanna for the libellants, or some of them. It appears that, except in the case of Ware, the men were imprisoned by, or at the instance of the captain; but Ware was put in gaol, by the police officers of the city, for some misconduct or offence against the laws of the country. For the money paid by the captain to obtain his liberation from imprisonment he is justly chargeable, and the respondent must be credited with the amount. But no such credit will be allowed against the men imprisoned by the captain for his grievances or complaint. I have declared that I will not countenance the practice of thrusting our seamen into foreign gaols by the captain, through the influence he may have with our consuls or the officers in a foreign port. It is always a most severe punishment, and in some climates dangerous to health and life. The punishments which the law authorises the master to inflict on board of his vessel, by personal correction, by confinement and other privations, are generally sufficient for all the purposes of discipline. It should be only in a case of some pressing necessity, of some danger to the vessel, or her master or crew, that the men should be imprisoned on shore.

Decree. It is ordered and decreed, that the libellants shall recover and have from the respondent, the wages severally due to them, from the time they respectively shipped and entered on board of the said ship Moss, until the time when they respectively left the said ship, and ceased to perform any service or duty on board of her, deducting therefrom all payments made to the said libellants respectively, and all credits to which the respondent is entitled for advances of money or goods; and also deducting from the wages severally due to the libellants, the amount paid by the respondent beyond the amount stipulated to be paid to the libellants, to the hands employed in their places for the remainder of the voyage after the libellants had left the ship.

And it is further ordered and decreed, that there be deducted

from the wages due to Alexander Ware, the money paid by the respondent to obtain his release from the prison at Havanna, in which he had been confined by the authority of that city for offences against its laws and police; but no deduction shall be made from any of the libellants for or on account of any prison fees, or other costs and charges, induced by or in consequence of their imprisonment by the captain of the ship, or the American consul at his instance.

And it is further ordered and decreed, that the several accounts of the libellants be adjusted and paid on these principles, and in case of any disagreement between the parties, be reported and referred to the court for final adjudication.

The several claims of the libellants for short allowance are dismissed, and also their claim of two months' pay to keep them at Havanna and bring them home to Philadelphia.

On the 31st December, 1831, the parties having reported their adjustment of the accounts of the several libellants to the court for a final adjudication, it was ordered and decreed that there be paid by the respondent to the libellants severally, the following sums, to wit, to Alexander Ware one hundred and nineteen dollars and nine cents; to John Dunderfield one hundred and forty-three dollars and thirty-two cents; to John Magee one hundred and forty-nine dollars and two cents; and to William Pitt eighty-four dollars and ninety-seven cents.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

FEBRUARY SESSIONS, 1832.

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THE UNITED STATES OF AMERICA

*v.*

FOURTEEN PACKAGES OF PINS IMPORTED IN THE SHIP ALLEGHANY.

1. Where a seizure is made on land under the laws of impost, the claimant has a right to a trial by jury.
2. On an information for forfeiture of goods, subject to ad valorem duty, the appraisement of the public appraisers is a necessary and preparatory proceeding, and is prima facie evidence.
3. The assistant appraisers of goods subject to ad valorem duty, under the act of 28th May, 1830, are in aid of those under the act of 1st March, 1823; and an appraisement by each set is not necessary.
4. A false valuation in an invoice of goods subject to ad valorem duty, is a price charged in the invoice, less than the fair and just buying and selling prices, at the time and place where the invoice was made up.
5. To subject goods to forfeiture, for a false valuation, it must be accompanied by a fraudulent intent and design.
6. Where a new penalty is imposed, for a violation of the laws of impost previously defined, it may be inforced, though unknown to the claimant at the time of the violation.
7. Where, on an information for forfeiture, a claim and answer are filed by an agent and consignee, for the owner, and the jury are sworn to try an issue between the United States and the owner, the court will not, after verdict, grant a new trial, on the ground that the jury were incorrectly qualified.
8. It is no invasion of the privilege of the jury for the court to present to them their views of the nature, bearing, tendency, and weight of the evidence.
9. The court are not bound to notice in the charge, a point of law embraced in the argument, unless their opinion upon it was explicitly required.

10. A juror ought to disregard his private knowledge, and to render his verdict solely on the legal and open testimony of the cause.

On the 17th September, 1830, the Attorney of the United States for the Eastern District of Pennsylvania, filed an information against thirteen cases of pins, and one case of needles, imported into the port of Philadelphia, on the 4th August, 1830, from Liverpool in England, on board of the ship Alleghany. The information alleged, that the said goods were subject to ad valorem duty, and that the invoice thereof, and the packages themselves, were made up with intent, by a false valuation, to evade and defraud the revenue of the United States, whereby the same were forfeited; and due process of law for the condemnation of the goods in question, was prayed for.

On the 12th November, 1830, William C. Cardwell and John Potter filed a claim to the said fourteen packages, as consignees of the same from, and for and on behalf of, their consignors Kirby, Beard and Kirby, of London, by whom, as they alleged, the said packages were in the regular course of business shipped from Great Britain and consigned to them In answer to the information, the claimants denied that the invoice and packages were made up with intent, by a false valuation, to evade and defraud the revenue; and they submitted that if the allegation to that effect were true, it would not authorise a forfeiture, but only a reappraisement and increased duty under the act of congress of 1st March, 1823.

On the 8th April, 1831, the case came on to be tried before the District Court, sitting as a court of admiralty and maritime jurisdiction, under the provisions of the ninth section of the act of 24th September, 1789; Dallas, District Attorney, in support of the information, and Scott for the claimants.

Dallas, for the United States, offered evidence in support of the allegations set forth in the information. In the course of this evidence, it appeared that the fourteen packages had not been seized by the officers of the revenue, until after they had been landed, and that the first suspicion of fraud arose on an examination of them in the custom house stores.

Scott for the claimants.

Upon this evidence the case cannot be tried before the court, as one of admiralty and maritime jurisdiction, but the claimants are entitled to a trial by jury. It is the place of seizure and not of committing the offence that decides the mode of trial. The ninth section of the act of 24th September, 1789, reserves to the parties the right of a common law remedy, where the common law is competent to give it, which is the case here. 1 Story's Laws 56. The United States v. La Vengeance, 3 Dallas, 297. The United States v. The Betsey and Charlotte, 4 Cranch, 443. Whelan v. The United States, 7 Cranch, 112. The Sarah, 8 Wheaton, 394. The Margaret, 9 Wheaton, 427. Clark v. The United States, 2 Washington, 521. The Isabella, 1 Paine, 1. The United States v. Nine Packages of Linen, 1 Paine, 129. The United States v. Hair Pencils, 1 Paine, 405.

On the 17th June, Judge Hopkinson decided for the claimant, that as it appeared that the seizure in this case was made upon the land, it was to be tried by a jury. It was therefore ordered, that it be set down for trial by a jury, and that the information and claim be so amended as to be made conformable to an issue to be so tried.

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On the 5th March, 1832, the case came on for trial before Judge Hopkinson and a special jury. It was argued by Gilpin, District Attorney, for the United States, and Scott for the claimants.

Gilpin for the United States.

This information was founded on the fourth section of the act of congress of the 28th May, 1830, which is as follows: "The collectors of the customs shall cause at least one package out of every invoice, and one package at least out of every

twenty packages of each invoice, and a greater number should he deem it necessary, of goods imported into the respective districts, which package or packages he shall have first designated on the invoice to be opened and examined, and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order forthwith all the goods contained in the same entry to be inspected; and if such goods be subject to ad valorem duty, the same shall be appraised, and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent by a false valuation, or extension or otherwise to evade or defraud the revenue, the same shall be forfeited." And the fifteenth section of the act of 1st March, 1823, and so much of any act of congress as imposes an additional duty or penalty of fifty per cent. on duties on any goods appraised at twenty-five or ten per cent. above their invoice, are repealed. 3 Story's Laws, 1887. Pamphlet Laws of 1830, p. 106.

Evidence was then given of the invoice of the goods in question, made by the manufacturers, Kirby, Beard and Kirby, on the 2d June, 1830, and their arrival in Philadelphia, and entry by Cardwell and Potter as consignees of the manufacturers and owners, on the 7th August following. It was also proved that one of the packages, on being opened and examined, was found to be falsely charged in the invoice, and therefore all the packages were examined and appraised by the public appraisers. On their appraisement being offered, it was objected to.

Scott for the claimants.

This appraisement is not evidence, because it is improperly made, and because it is no proof of fraudulent intent.

I. By the act of 1st March, 1823, two principal appraisers were appointed for this port, who are the persons by whom this appraisement was made. The act of 28th May, 1830, on which this information is founded, declares that the secretary of the treasury may appoint two assistant appraisers, whose appraise-

ments are to be revised and corrected by the former. It evidently contemplates such a previous examination which did not take place in this instance. It is to give the merchant the benefit of appeal and revision. Though it is said these assistants 'may' be appointed, it has been settled that such permission is compulsory in its character where the public have an interest in its fulfilment. 3 Story's Laws, 1687. Rex v. Inhabitants of Derby, Skinner, 370. Alderman Backwell's case, 1 Vernon, 152. Rex v. Barlow, 2 Salkeld, 609. Commonwealth v. Gable, 7 Serg. & Raw. 426. Schaeffer v. Jack, 14 Serg. & Raw, 429. Newburg Turnpike Company v. Miller, 5 Johnson Ch. Rep. 112. Malcolm v. Rogers, 5 Cowen, 188.

II. An appraisement is no evidence on a question of forfeiture; it is meant to ascertain what duties are to be charged; it is no evidence of value at the time and place of exportation.

Judge Hopkinson stopped the District Attorney, who was about to reply, and admitted the evidence.

The act of 1st March, 1823, appoints two appraisers for this port; that provision of it has never been repealed expressly, but it is said to be virtually, by the section of the act of 28th May, 1830, which authorises the secretary of the treasury to appoint two assistant appraisers. I think not. The object of the last act was the public convenience; it authorised the appointment of four assistant appraisers in New York and two here. What are they to do, and what are their power and duty? To examine such goods as the principal appraisers may direct, should they be unable themselves to perform all that may be required, and need such additional aid. On the construction which has been given, the public business will not be assisted, but delayed. Every case may be subjected to a double examination. The business will not be distributed among the four officers, but must always pass under the notice of two in the first instance, with a correction or revision of the other two. By a double process the assistants are to report to the principals, and the principals to the collector. Such is not the inten-

tion of the law; these officers are to act for and under the principal appraisers when necessary; they are to be appointed by the secretary of the treasury when the public service requires an increased number of appraisers; but there is nothing compulsory upon him to make such increase, and nothing which makes them independent of, or distinct from the principal appraisers in the manner contended for. As to the second objection, it is sufficient to observe that this appraisement is required by the act of congress as the foundation of a forfeiture, as a preparatory step or proceeding in the course of forfeiture. It is therefore prima facie evidence, and as such properly introduced; but it is not conclusive; it may be rebutted or disproved by the claimants.

Gilpin for the United States, in continuation.

The appraisement in question was then read together with a reappraisement by the same officers. The claimants being dissatisfied, a third appraisement was made by the same officers together with two merchants, selected by the claimants and approved by the collector, according to the provisions of the eighteenth section of the act of 1st March, 1823. This was also read; as was a smaller invoice or bill of sale of the same goods left at the custom house, as was alleged, by accident. Several witnesses, who had imported similar articles and received invoices, to which they referred, were examined to prove that the invoice in question was lower than the current market value at the time and place of exportation. 3 Story's Laws, 1888.

Scott for the claimants.

Testimony under a commission to England was read to prove, that the invoice prices were the actual value at the time when and place where it was made. But besides, it was said, the preparatory steps necessary to a forfeiture had not been taken. The appraisement by the merchants was under the act of 1st March, 1823. Where this act is inconsistent with that of 28th May, 1830, it is repealed pro tanto. The latter act prescribes a new mode of reappraisement where the owner is dissatisfied,

the old mode is therefore repealed, yet it was adopted here. To sustain a forfeiture the law must be strictly complied with. To show that these goods are falsely valued, we must ascertain what the law means by a true valuation. This varies in the different acts relative to ad valorem duties. That of 3d March, 1817, fixes "the net cost of the article at the place whence imported" as the test; that of 20th April 1818, "the actual cost;" that of 1st March, 1823, "the actual cost, if the goods have been actually purchased, or the actual value if the same have been procured otherwise than by purchase, at the time and place when and where purchased or procured;" that of 19th May, 1828, "the actual value at the time purchased, and place whence imported." The invoice, therefore, must contain the 'actual value' of the goods to the manufacturers at the place of manufacture, and at the time they sent them to their agents here. It does so. We have their oath annexed to the invoice; and it is entitled to great weight. There is no evidence even attempting directly to disprove this. As to any fraudulent intent to violate the act of 28th May, 1830, it could not exist, for their invoice is dated 2d June, 1830, long before they could have known of its passage. 3 Story's Laws, 1633, 1680, 1885. Pamphlet Laws of 1828, p. 47. The Isabella, 1 Paine, 7. The United States v. Nine Packages of Linen, 1 Paine, 146. The United States v. Hayward, 2 Gallison, 485.

Judge Hopkinson delivered the following charge to the jury:

The information charges that the goods in question, being subject to an ad valorem duty, were imported into Philadelphia from Liverpool, in the ship Alleghany, and that the invoice and packages were made up with intent by a false valuation to evade and defraud the revenue of the United States. Two subjects or questions are thus submitted to your inquiry and deliberation. 1. Is the valuation of these pins, as it appears in the invoice, a false valuation? 2. If it is so, then, were this

false valuation and the invoice made up with intention to defraud the revenue of the United States?

The information is founded on the fourth section of the act of 28th May, 1830, which has been frequently referred to. The proof in support of the allegations of the information consists of official documents and parol testimony. You have before you a paper called the small invoice. It is dated at London, on the 2d of June; not at Liverpool, where the goods were shipped. It is for you to say what this paper is? Why was it prepared, and what use was to be made of it? It is said to be an estimate made for the export entry; but how could this be, as the particulars were not then known? You will make these inquiries and satisfy yourselves. The regular invoice is dated on the 24th of June. Both papers came with the ship. The first paper is not in form an invoice; the second is in the usual form. The first is like a common bill of sale, headed, "Messrs. Cardwell & Co. of Philadelphia, bought of Messrs. Kirby Beard & Kirby." In it the valuation of the goods is higher than in the regular invoice. Why was this done? Does it afford ground for a reasonable suspicion, that the first paper contains the real value of the goods, and the price at which they were actually sold; and that the second was prepared for the custom house entry?

It was on the second or regular invoice that the entry here was ordered, and the question is on this invoice. Does it exhibit a true or a false valuation of the goods? If it be true, then any suspicion arising from the other, is of no importance: for, if the goods were entered at their true value, by a true invoice, there has been no forfeiture or violation of the law. On the other hand, if this is a false invoice, then the character and object of the other invoice may be important in deciding upon the intention of the second. (The two papers were here referred to, and the prices particularly stated.) The first proceeding under the law, was the appraisement made by the official appraisers. Compare their valuation of the goods with that given in the invoice. The second appraisement was

made by the special appraisers, to whom were added two others appointed by the consignees. This was done under the eighteenth section of the act of 1st March, 1823. From the appraisements, and from the evidence given to the jury by the appraisers, it appeared that extraordinary pains were taken to ascertain the value of the goods, and every means of information resorted to. The attention of the appraisers was particularly drawn to the proper inquiry, that of the value of the goods in the London market; they made all allowances for any change in the market, for any difference in the quality and weight of the pins. You will compare this with the previous appraisement, and can hardly fail to obtain a satisfactory knowledge of the true value of these articles, in the London market, at the time of their exportation.

In addition to these appraisements, numerous witnesses have been examined at the bar, dealers in the article, importers at the time of this importation, as well as before and after it. They produced their invoices, and stated the prices at which they made their purchases. Some of them made their importations at the same time with the claimants, from the same place, and even from the same manufactory. (The judge turned to the evidence of these witnesses, making observations explanatory of each.) You will also give due attention and weight to the testimony on the part of the claimants. It cannot have escaped your observation, that among the numerous importers of pins in this city or country, they have not produced one witness, to verify or support the prices of their invoice; not one importation or invoice; nor a single sale at these prices. They have a commission to England; but they have examined only two witnesses under it, although dealers in, and manufacturers of the article. They have not shown a single sale in London, or any part of England, of any pins of any quality, at the prices of their invoice, or near to them. You have, under this commission, the testimony of Donald McIlvaine, with his opportunities of knowledge on the subject, as they appear from his own answers. His evidence, too, is hard to be reconciled with

the letter of the claimants to John Bury, and their own invoice sent to him. The other witness, William Broughton, is a pin maker in the employ of the claimants, but says he has no exact knowledge of the prices.

All the evidence which has been given of prices, or market value, or fair market value, or current value, or true value, or actual value, is to bring you to the same conclusion, to a satisfactory answer to the question you are trying, to wit, is the valuation of these goods in this invoice a 'false valuation,' which is the offence described in the act of congress of 1830, on which this information is founded? Were these goods really worth more in the London market? Were the buying and selling prices higher in that market than those charged in this invoice, at the time when this invoice was made up? However the phrases may vary in the different acts of congress, current value, actual value, or market value, the inquiry with you always is the same; does this invoice contain a true valuation of these pins, or a false one? The phraseology of the laws is important, on this issue, only as it may assist you in answering and deciding the question whether these pins, or similar pins, were bought and sold in the London market, in June, 1830, at these prices? Or is the valuation false and untrue, and the prices not those at which such pins were bought and sold at that time and place? You are not to take a sale under particular circumstances which may have depressed or raised the price, but the fair and just price of buying and selling in the market.

If, upon a liberal and impartial view of the whole evidence, you shall come to the conclusion that the valuation in the invoice is false, it will then be your duty to inquire whether this has happened by accident, inadvertence, or mistake, or with intent to evade and defraud the revenue of the United States. The fact is not enough; it must be accompanied by the fraudulent intent and design. This is not often capable of direct, express proof, but the intention of the party, as in other similar cases, must be collected from all the facts and circumstances.

In this inquiry, the amount of the undervaluation is important, because, if great, it is less likely to be a mistake, and because the difference offers a sufficient temptation in the diminution of the duties, to account for it. This is the part of the case peculiarly belonging to your office, and which you will make with all necessary caution, as the character of the claimants has been strongly pressed upon you to repel the suspicion of a deliberate, contrived fraud. How far these foreign manufacturers regard our revenue laws, or think there is much guilt in getting an advantage of them, you can better judge than the court. We have reason to believe that some dealers think every thing fair in a contest with a custom house, especially abroad. It is due to the consignees of this shipment, Messrs. Cardwell and Potter, to say that if there is any thing wrong in the business, they are not implicated in it. They entered the goods by the invoice which came to them with the goods.

The Jury found a verdict for The United States.

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On the 15th March, 1832, a motion was made on behalf of the claimants for a new trial, and the following reasons were filed:

I. Because the jury were sworn to try the issue between the United States and Kirby Beard and Kirby, claimants, whereas no such issue exists upon the record.

II. Because the jury were incorrectly qualified.

III. Because the court erred,

1. In admitting in evidence the three several appraisements, for any other purpose than to prove the United States had taken the steps necessary to seizure.

2. In admitting them in evidence for any purpose.

3. In admitting in evidence the invoices of John Siter, William Chaloner, Joseph Brown, and John Bury.

IV. Because the court, in the charge to the jury, erred,

1. In instructing them that there was nothing in the objection that the act of 28th May, 1830, was unknown to Kirby Beard and Kirby, before they shipped the pins.

2. In instructing them that the appraisements were properly made, and the act of 28th May, 1830, did not, quoad hoc, repeal the section in the act of 1st March, 1823, relating to appraisement.

3. In instructing them that the paper called the small invoice was a suspicious paper, a false one, and such as to throw doubt on the transaction.

4. In instructing them that the appraisements were made with great care, and therefore entitled to great weight in their consideration.

5. In instructing them to consider John Siter's testimony as of special importance.

V. Because the court did not charge the jury on the rule of law pressed in argument by the counsel of the claimants, in reference to the testimony of Donald M'Ilvaine, viz. that he was entitled to belief unless impeached, and that no such attempt having been made, he stood before the jury entirely worthy of credit; but on the contrary, simply remarked, "it was strange he did not purchase at the prices named."

VI. Because the court told the jury that the claimants had known all the testimony of the United States for eighteen months, and yet produced none to contradict it; there being no proof of that knowledge given at the trial, and the court being entirely mistaken as to the fact.

VII. Because the general tenor of the charge of the court was such as to take away the question of fact from the jury.

VIII. Because the court remarked that it was extraordinary Kirby Beard and Kirby, should have examined Broughton, a man in their own employ.

IX. Because the court erred in saying,

1. That the various expressions in the acts of congress on the subject of value and the computation of ad valorem duties, were unimportant in the case.

2. That to prove value at London, value at Manchester, Liverpool, and Warrington, could be a guide.

X. Because when the jury came in, and one of them asked whether, in making up his opinion, he was at liberty to avail himself of his own previous knowledge, the court replied "Your oath is to decide according to the evidence, this is the only proper guide for your decision."

XI. Because the court subsequently intimated to the same juror, that unanimity was not to be expected, and that he should endeavour to come to the opinion of his fellows.

On the 31st March, 1832, this motion was argued by SCOTT for the claimants, and GILPIN, District Attorney, for the United States.

SCOTT for the claimants.

The following cases were cited, Reniger v. Fogossa, Plowden, 12. Partridge v. Strange, Plowden, 83. The Cotton-planter, 1 Paine, 23. United States v. Nine Packages of Linen, 1 Paine, 129. Doebler v. The Commonwealth, 3 Serg. & Raw. 237.

GILPIN for the United States.

The following cases were cited, 3 Blackstone's Com. 375. United States v. Williams, 1 Paine, 261. Smith v. Parkhurst, Andrews, 321.

Judge HOPKINSON delivered the following opinion:

Numerous reasons have been filed in this case against the verdict, and to support the motion on the part of the claimants, for a new trial. Some of them have not been touched, or insisted upon in the argument on the motion, and therefore will not require a particular attention from the court. Such as have been maintained in the argument will be considered and disposed of.

The first and second reasons are; "because the jury were sworn to try the issue between the United States and Kirby Beard and Kirby, claimants, whereas no such issue exists upon the re-

cord; and because the jury were incorrectly qualified." I have no doubt that the jury were properly sworn, both as regards the real parties in interest, and as they appear upon the record, but I shall put the dismission of this exception on another ground. The first four jurors called to the book were sworn to try the issue between the United States and Fourteen Packages of goods, whereof Cardwell and Potter, were claimants. The counsel for the claimants immediately interrupted the clerk, and observed to him that Cardwell and Potter were not the claimants, but the agents of the claimants, who were Kirby Beard and Kirby, and that the jury should be so sworn. Under this direction, to which the district attorney assented, the four jurors were re-sworn according to it, and all the other jurors were also so sworn. It is now objected to the verdict, that the jury should not have been so sworn or qualified; that Kirby Beard and Kirby, are not the claimants on the record, but the issue was between the United States and Cardwell and Potter, claimants. Can it be imagined that a court, holding the power to set aside a verdict and grant a new trial, for the purposes of justice, would exercise that power under such circumstances, when the error, if any, was the error of the party who would now take advantage of it; and which is confessedly a mere matter of form, a pure technicality, having no influence or bearing on the merits of the case? It is impossible.

The next, or third class or head of reasons, relates to alleged errors of the court. 1. and 2. "In admitting the three appraisements to be read in evidence." This exception was passed over in the argument. Indeed I know not what could have been said for it, as the appraisements in question were not only a part of the proceedings directed in such cases by the act of Congress, but were read to the jury on the express call of the counsel of the claimants. 3. "In admitting in evidence the invoices of John Siter, William Chaloner, Joseph Brown, and John Bury." As to the invoices of Siter, Chaloner, and Brown, they were neither offered nor given in evi-

dence. These gentlemen had severally made importations of articles similar to those in question, and they were examined as to the prices they had paid for them. They did refer, without objection, to their invoices to assist their memory in ascertaining these prices; but the invoices were not read to the jury, nor, in any other manner, made a part of the evidence of the cause. No exception was taken or noted by the claimants to the decision of the court on the admissibility of the question, what were the prices paid by the witnesses for their articles, although the question was objected to; and as to the invoices, they were used in no other way than that mentioned. The invoice of John Bury was offered and read in evidence, and also the letter which accompanied it, because both the invoice and the letter came from the claimants, and were clearly evidence against them. If this were not so, their admission can afford no ground of exception to the verdict, as they were given to the jury without objection.

These are all the reasons founded on supposed errors of the court in the course of the trial. The next class, the fourth, relates to alleged errors in the charge to the jury.

1. "In instructing the jury that there was nothing in the objection that the act of 28th May, 1830, was unknown to the house of Kirby Beard and Kirby before they shipped the goods in question." I cannot withhold the expression of my surprise that this reason should be seriously urged to the court, however expedient it might have been to address it to a jury, to enlist their feelings for the claimants, on a supposed ignorance of the law they were offending. What are the purport and effect of the law of 28th May, 1830? Do they create a new offence, or make that unlawful, which was before lawful? Certainly not so. The offence committed was always a violation of the laws of the United States, visited by certain and severe penalties. But these penalties were found not to be adequate to prevent the offence: the temptations to cupidity were too strong to be restrained by an increase of duties on the goods which were falsely invoiced. The penalty

was therefore enlarged to an entire and absolute forfeiture of the goods. The plea of the claimants is, we knew that by making up this false invoice, with intent to defraud the revenue of the United States, we were violating a law of the United States, but we supposed that in case of detection we should suffer only by an increased charge upon our goods, and not by their forfeiture, and therefore we are innocent: therefore we should be acquitted of all penalty, and the jury should so have rendered their verdict. This is a most extraordinary course of reasoning in law or morals. Besides, did Messrs. Kirby Beard and Kirby require to have a knowledge of the enactments of the act of 28th May, 1830, to teach them that fraud and perjury are crimes every where, under all circumstances, and upon all subjects? Yet it was only by and through fraud and perjury that the offence, charged and proved upon them by the verdict of a most respectable and intelligent jury, could have been perpetrated. But, in their code of morals, fraud and perjury are nothing, unless they are to be followed by a forfeiture of goods. These remarks are reluctantly made: but they are rendered necessary by the perseverance and zeal with which this reason has been pressed, first upon the jury, and now again upon the court.

2. The second reason under the fourth head relates to the appraisements, and was not noticed in the argument.

3. The third reason under the same head, which relates to the small invoice, was also passed by in the argument. As to that paper, I told the jury, that there was a mystery about it, which had not been explained, not merely because it gave a different valuation to the goods from the regular invoice by which the goods were offered for entry, but that it purported to be a bill of sale from Kirby Beard and Kirby, to Cardwell and Potter, when in truth no such sale was made, but the goods were sent to this country for and on account of Kirby Beard and Kirby; and Cardwell and Potter, were but the consignees, having no ownership in them and no interest but as consignees. I stated other circumstances which threw a cloud

of suspicion over this part of the case, together with the explanations that were offered on the part of the claimants; and left the whole to the jury for their consideration with this observation; "The jury must say what this paper means, and whether it affords ground for reasonable suspicion of an unfair intention."

4. The fourth error, under this head, is "in instructing the jury that the appraisements were made with great care, and were therefore entitled to great weight in their consideration." As these appraisements were received in evidence, I cannot perceive in what was the error or the mischief, to say that they had been made with great care. The appraisers appeared before the jury, and made the same appraisements under their oaths taken here, as they had under their official oaths taken at the custom house. They explained particularly the time, which was several days, occupied in the business, and the means they took to obtain information, to assist them in ascertaining the true value of the articles at the time and place required by the law. Was there any error in telling the jury that appraisements thus made, for whatever purpose they were given in evidence, were entitled to their respect in proportion to the care with which they had been made? I think not.

5. The fifth point, under this head, has not been insisted upon; indeed it is a mistake in point of fact. The jury were told to consider John Bury's testimony of special importance, because it came from the claimants themselves; but this was not said as to evidence of the United States.

We come now to the fifth general head; "because the court did not charge the jury on the rule of law, pressed in argument by the counsel of the claimants, in reference to the testimony of Donald M'Ilvaine, viz. that he was entitled to belief unless impeached, and that no such attempt having been made, he stood before the jury entirely worthy of credit; but on the contrary remarked, that it was strange he did not purchase at the prices named."

If the judge had instructed upon this point, as the exception requires him to do, he might indeed have been charged with

invading the rights of the jury. If there be any thing which peculiarly belongs to them in the trial of a cause, it is to judge of the credibility of witnesses, and it is not for the court to direct or instruct them who is entitled to belief, or who stands before them entirely worthy of credit. As to the evidence of Donald M'Ilvaine, if I had told the jury my opinion of it, it would have been, that it was impeached by all the evidence of the cause, and by circumstances testified by himself. I repeat now what I said to the jury; it is difficult to reconcile the evidence of Donald M'Ilvaine with his conduct; it is difficult to discover why, if he were desirous of purchasing goods for himself, and had orders to do so from others, he did not take them at the prices he says they were offered to him for, as these prices were certainly lower than any other sales or offers we had any account of, and much lower than the actual sales made about the same time. It is difficult also to reconcile his testimony with the letter and invoice received by John Bury, from Kirby Beard and Kirby, in which the pins are charged at a much higher price than Donald M'Ilvaine says the same house offered them to him for, at or near the same time, and which prices Kirby Beard and Kirby assure Mr. Bury were their lowest. After these remarks I told the jury, that nevertheless, Mr. M'Ilvaine had sworn positively to the fact, and they would give the weight they thought proper to his testimony, under all the evidence and circumstances of the case.

There is another answer to this exception to the charge of the court, which I mention, not because it is necessary in this case, but on account of its general importance. If the counsel in a cause desire to have the opinion of the court given to the jury upon any point or matter of law, it is their duty to state it explicitly, and to ask the opinion of the court, or they cannot make the silence of the court, or an omission to instruct the jury upon that point, a ground for a new trial. Misdirection is always a good ground, but not an omission to direct, when no direction is required. It is not enough to say, that the counsel "pressed a point in his argument." He must do more. No

court is bound to give specific answers to, or notices of all the matters the counsel may think it expedient to press upon them in the argument. When a charge or opinion of the court is wanted on a particular point, it must be particularly stated and asked for. Such is the practice, and such it ought to be, or verdicts would be perpetually in danger from concealed objections.

The sixth general reason is, "because the court told the jury that the claimants had known all the testimony of the United States for eighteen months, and yet produced none to contradict it; there being no proof of that knowledge given at the trial, and the court being entirely mistaken as to the fact." The entire mistake as to the fact is found in the exception and not in the court. I speak not of my personal knowledge that this case was formerly heard before me, and proceeded on to the close of the testimony on the part of the United States, when it was dismissed on discovering that it was a case for a jury and not for the judge alone. But on this trial of the cause, the former hearing was repeatedly referred to by the counsel on both sides. Indeed in the cross examination of some of the witnesses of the United States, they were questioned by the claimants' counsel as to what they had said, and as to the evidence they had given on the former hearing. I reminded the jury of this fact, that there had been a former hearing at which these witnesses had been fully examined in the presence of the claimants' counsel and cross examined by them; and remarked to them that by this means the claimant had been made acquainted with the evidence by which he was now assailed, and had had full time to repel it, but that he had not produced a single importer of pins in the United States, to prove that he had purchased pins at the prices of his invoices, nor any manufacturer in England to say that he had sold them at such prices. I see no error or extension of the right of the court over the jury box in these observations, or departure from the evidence of the case.

The seventh reason is, "that the general tenor of the charge

was such as to take away the question of fact from the jury." The generality of this exception admits only of a general answer, and might be dismissed for the reason that it specifies nothing; but I will take the occasion to state what I believe to be the right and duty of a court in charging a jury, beyond which not a step was taken in this case. That the question of fact should not be taken from the jury by the court, is too clear to be the subject of a discussion; but I hold it to be equally certain, that it is the right and duty of the court to give its aid to the jury in explaining the evidence; in collating its various parts; in drawing their attention to the most material facts in proof and their application to and bearing upon the important points of the case; in ascertaining, between contradictory testimony, which is best entitled to belief; with such comments as will clearly explain to them the views taken by the court of the case. All that is necessary is, that the jury should distinctly and explicitly understand that such observations are to be received by them, merely for the purpose of assisting them in their deliberations, of recalling their recollection to the facts testified, and of turning their attention to the true points of inquiry; but that the decision to be made upon the evidence belongs altogether to them, and that no direction or authoritative instruction is intended to be given concerning them. These doctrines are fully recognised and strongly enforced by Starkie (1 Starkie's Evid. 440.) That respectable author says; "The practice of advising the jury as to the nature, bearing, tendency, and weight of evidence, although it be a duty which, from its very nature, must be, in a great measure, discretionary on the part of the judge, is one which does not yield in importance to the more definite and ordinary one of directing them in matters of law. The trial by jury is a system admirably adapted to the investigation of truth, but, in order to obtain the full benefit to be derived from the united discernment of a jury, it must be admitted to be essential that their attention should be skilfully directed to the points material for their consideration." After some further remarks, this

author adds that, "jurors unaccustomed, as they usually are, to judicial investigations, require, in complicated cases, all the aid which can be derived from the experience and penetration of the judge, to direct their attention to the essential points, and enable them to arrive at a just conclusion." Again, after saying that the jury should have "excluded from their consideration all such evidence as is likely to embarrass, mislead, or prejudice them in the course of the inquiry," he proceeds; "Much yet remains to be done of a nature which cannot be defined: to divest a case of all its legal incumbrances; to resolve a complicated mass of evidence into its most simple elements; to exhibit clearly the connection, bearing, and importance of its distinct and separated parts, and their combined tendency and effect, stripped of every extrinsic and superfluous consideration, which might otherwise embarrass or mislead a jury; and to do this, in a manner suited to the comprehension and understanding of an ordinary jury, is one of the most arduous as well as the most important duties incident to the judicial office." In this powerful delineation of what a charge to a jury ought to be, who is not reminded of the clear and luminous order; of the strong and satisfactory discriminations; of the admirable combinations of facts and circumstances, with which Judge Washington discharged this "most arduous as well as most important duty of the judicial office?"

I have quoted the opinions of this author, which he sustains by authority, thus at large, because I think them replete with good sense and practical utility; and that it is only by following them that the trial by jury will be attended by the invaluable advantages which belong to it. It is a solecism to say that a court may set aside the verdict of a jury, if, in the opinion of the court, it be contrary to evidence, and yet that it is an invasion of the right of the jury over the facts, if the court should present their views of the evidence in order to prevent the error instead of correcting it. In the case in question no instance has been pointed out in which the court exceeded or even filled the space here allowed. The evidence given on

the trial was arranged in the order of the points to be considered and decided, but its effect was left fully and without prejudice to the jury. The witnesses were named, and the circumstances alluded to which might detract from or give weight to their testimony; but their credibility, positive and comparative, was distinctly submitted to the judgment of the jury; and finally the allegation of the exception that "the charge of the court was such as to take away the question of fact from the jury," has not been supported by any reference to the charge, or any part of it, found in the notes of the judge, or in those of any of the counsel, nor by the recollection of either as to any fact so taken from the jury.

The eighth reason is, "because the court remarked that it was extraordinary that Kirby Beard and Kirby should have examined Broughton, a man in their own employ." If any such remark had been made by the court, it would be an extraordinary reason for setting aside a verdict. But no such remark was made. It was said that it was extraordinary they had not examined some other witnesses on the question of market value, but had relied upon him, especially as he knew nothing of the market price and value of the article, but was a workman or manufacturer, and neither a buyer nor seller of the article.

The ninth reason is, "because the court erred in saying, that the various expressions in the acts of congress, upon the subject of value and the computation of ad valorem duties, were unimportant in the case; and in saying that to prove the value in London, value at Manchester, Liverpool, and Warrington, could be a guide." We find in this exception the same error, which attends so many of those we have to consider in this case, that is, an entire mistake of what was said by the court. I will transcribe from my notes what I did say to the jury on this subject; "All the evidence which has been given of prices, or market value, or fair market value, or current value, or true value, or actual value, is to bring you to the same conclusion, to a satisfactory answer to the question you are trying, to wit, is the

valuation of these goods in this invoice a 'false valuation,' which is the offence described in the act of congress of 1830, on which this information is founded? Were these goods really worth more in the London market? Were the buying and selling prices higher in that market than those charged in this invoice, at the time when this invoice was made up? However the phrases may vary in the different acts of congress; current value, actual value, or market value; the inquiry with you always is the same; does this invoice contain a true valuation of these pins, or a false one? The phraseology of the laws is important, on this issue, only as it may assist you in answering and deciding the question, whether these pins, or similar pins, were bought and sold in the London market, in June, 1830, at these prices?" I see no error in any part of these remarks. As to the other branch of this exception, that the court erred in saying; "that to prove value at London, value at Manchester, Liverpool, and Warrington could be a guide." The jury were certainly kept in mind that they were to inquire into and decide upon the value at London, and that the prices and value at other places mentioned, of which evidence was given on both sides, were to be considered by them only as auxiliary to that purpose, and they might make it so, as the witnesses had stated what was the ordinary difference of prices in these markets, when any existed. Some illustrations were given to show that the evidence was not to be confined literally to the time and place of exportation, or it would tie us down to the hour, and to the exact spot on which the manufactory or warehouse might stand.

The tenth reason is, "because when the jury came in, and one of them asked whether in making up his opinion, he was at liberty to avail himself of his own previous knowledge, the court replied; Your oath is to decide according to the evidence: that is the only proper guide for your decision." The language used by the court to the juror was not precisely that stated in the exception; although the difference may not be important. I am willing to give to my answer its full and fair

meaning; such as was probably understood by him. It certainly was not, nor was it intended to be, a prohibition to the juror to avail himself of his knowledge of the subject; to his giving his verdict on any ground or for any reason he might think proper, on his own responsibility; but it was a strong intimation to him. that it was his duty to render his verdict on and according to the evidence given in court, under oath, in the presence of the court the parties and the public, and not to disregard such evidence in favour of his private knowledge or opinions, derived from more uncertain and unsafe sources. It would have been idle in the court to attempt to prohibit what it could not prevent; for a juror may give his verdict as he wills to do, and no body has a right to question him for his reasons. All the court can do is to inform him what the law expects and his duty requires of him, that is, well and truly to try the issue submitted to him, and a true verdict to give according to the evidence; and it cannot be doubted that the evidence, intended by the law and the juror's oath, is the evidence openly given on the trial before the court. Certainly this is the true theory of the open public trial by jury, by witnesses, by evidence, in the presence of the court, of the parties, of the public, with the benefit of cross examination; and the usefulness and safety of this admirable mode of trial will be greatly impaired, if jurors are to understand that it is no usurpation of power, no violation of their duty, when they get secretly together in their private room, to put aside all the evidence of the cause, and bring together as the foundation of their verdict, all the opinions, prejudices, rumours and hearsays, which they may call their previous and personal knowledge of the subject. The same rule must be applied to criminal as to civil cases, and the accused can never be assured of safety, although the whole evidence given in his presence may testify his innocence, if he is to be tried secretly, by other evidence in the jury room.

These principles find ample support, and no contradiction from every authority in relation to them. In Tidd's Practice,

(page 936,) speaking of the insufficiency of the writ of attaint as a remedy for a false verdict, it is said: "There are numberless cases of false verdicts, without any corruption or bad intention of the jurymen. They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it." This hearsay and these prejudices are precisely what a juror might call, and conceive to be, a previous knowledge of the subject; and this error can be guarded against only by excluding them, as far as is practicable, altogether from the mind of the juror, and referring him, for his verdict, to the proper and legal evidence of the case. We find, every where, the principle sustained, that every thing which is to influence the verdict of a jury, should be openly delivered in the presence of the court. Thus in Hale's Pleas of the Crown (2 Hale, 306,) it is said: "If a juryman have a piece of evidence, in his pocket, and, after the jury sworn and gone together, he showeth it to them, this is a misdemeanour in the jury." So (at page 307,) it is said; "If the jury send for a witness to repeat his evidence that he gave openly in the court, it will avoid the verdict." The same law is laid down in the case of Metcalfe v. Dean. (Croke Eliz. 189.) Again, it is said by Hale, "If the jury, after their departure from the bar, desire to hear the testimony of a witness again, they may be sent for into court, and the witness may be heard again openly, where the court or parties may ask what questions they think fit."

In an anonymous case (1 Salkeld, 405,) it is said, "If a jury give a verdict on their own knowledge, they ought to tell the court so, that they may be sworn as witnesses; and the fair way is to tell the court, before they are sworn, that they have evidence to give."

In the case before us, the question asked by the juror and the answer given by the court are thus stated on my notes. They were read, at the time, to the juror, in the presence of the counsel, and agreed to be correct. "One of the jurors asks, 'whether he may avail himself of any previous knowledge, he has of the subject, in giving his verdict.' The court replied,

'the question is answered by the oath of the juror, to try the cause, and a true verdict give according to the evidence." I think I added, although it is not on my notes, that the evidence of a cause is that which is delivered on oath, in the presence of the court and the parties. The question was suddenly put to the court, and immediately answered, as I now think, with too much reserve, and that I might, and perhaps ought to have been more decided and peremptory in my instruction to the juror, to disregard his private knowledge, and to render his verdict solely on the legal and open testimony of the cause.

I am confirmed in this opinion, not only by the cases already referred to, but by others I shall now notice. When a remedy for a false verdict, or a verdict contrary to evidence could be obtained only by attainting the jury, a very severe proceeding against them, every presumption or possibility was resorted to in order to support the verdict, and save the jury from a judgment of attaint. But a salutary and reasonable change has taken place in the law of setting aside verdicts, since the practice of attainting jurors has been disused, and their mistakes are corrected by the more liberal and efficacious remedy of granting new trials. In Bacon's Abridgment, (3 Bacon's Abr. 778,) speaking of attainting juries, it is said; "but to attaint them for finding contrary to evidence is not so easy, because they may have evidence of their own cognizance of the matter before them, or they may find, on distrust of witnesses, on their own proper knowledge." This is the law of the text; and the old authorities are given for it; but in a note it is thus modified and corrected. "If a jury give a verdict on their own knowledge, they ought to tell the court so; but they may be sworn as witnesses; and the fair way is to tell the court, before they are sworn, that they have evidence to give." The anonymous case (1 Salkeld, 405,) already referred to, is here cited. The modern doctrine is more explicitly stated in the first volume of Starkie on Evidence, (p. 405.) He says; "Neither a judge nor juror can notice facts within his own private know-

ledge: he ought to be sworn and state them as a witness." A note informs us that the law was formerly otherwise; and the case of Partridge v. Strange (Plowden, 83,) is cited. The ancient doctrine was founded, as I have said, on the law of attaints. The note proceeds; "but this doctrine was again gradually exploded when attaints began to be disused, and new trials introduced in their stead. It is quite incompatible with the grounds on which new trials are every day awarded, viz. that the verdict was given without, or contrary to evidence." Afterwards, in the same volume, (page 449,) it is added; "It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge: for it could not be known whether the verdict was according to, or against evidence; it is very possible that the private grounds of belief might not amount to legal evidence. If such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross examined, and if he privately state such facts, it will be ground of a motion for a new trial." In the third volume of Blackstone's Commentaries, (page 374,) the doctrine and reasons of Starkie are recognised as the law of that day. If such be the law, there was no error in the answer given by the court to the inquiry of the juror; at least, none of which the claimants can complain. The court might have been more explicit and direct, in cautioning the juror against making up his verdict on his previous or personal knowledge.

The eleventh and last ground of exception is a most striking misconception of the court, to wit, that the court intimated to the juror who made the foregoing inquiry, "that unanimity was not to be expected; and that he should endeavour to come to the opinion of his fellows." There is mistake in every part of this allegation. The remark which the court did make was addressed to the whole jury, and not to any particular juror. It arose on an occasion having no relation to the ques-

tion asked as above by a juror; nor, according to my recollection, was it at the time when that question was put to the court, for the jury came in more than once before they gave their verdict. On one of these visits to the court, subsequent, as I think, to that on which the question was asked, but this is not material, one of the jurors expressed himself with much impatience, and in very strong terms, of the obstinacy of one of his fellows, alluding, as I suppose, to the very juror who had made the inquiry of the court. It was then that I remarked, that it could hardly be expected that twelve men would at once agree upon any subject of any difficulty, and that it was a duty they owed to each other to exercise patience and forbearance in their discussions; to listen calmly to one another, and truly endeavour to come at last to the same opinion.

In making this laborious examination of these reasons for a new trial, I have been governed, as may be seen, not by the difficulties I found in them, but by my respect for the counsel who has considered and treated them as matters of importance.

Rule to show cause why a new trial should not be granted, discharged.

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## The United States of America

*v.*

## John Halberstadt.

1. In a civil action, brought to recover a pecuniary penalty, the court has full power to grant a new trial, although the verdict was in favour of the defendant.
2. The responsibility of a merchant for the negligence or unlawful acts of his clerk, is limited to cases properly within the scope of his employment.
3. Where an empty cask, which had contained foreign distilled spirits, has been purchased for, and removed to the store of, a commission merchant by his clerk,

before the marks set thereon under the provisions of the act of 2d March, 1799, have been defaced, the former is not liable to the penalties of the act, if he had no agency in or knowledge of the purchase and removal, nor acquiesced in the illegal proceeding of his agent.

4. The provisions of the act of 2d March, 1799, which require certain marks to be set upon casks containing foreign distilled spirits, are not repealed, directly or constructively, by the act of 20th April, 1818, requiring the deposit of distilled spirits in the public warehouses.

By the forty-fourth section of the act of congress of 2d March, 1799, regulating the collection of duties on imports and tonnage, it is provided, that on the sale of any empty cask which has been branded or marked by the officers of inspection as containing foreign distilled spirits, prior to the delivery of it to the purchaser or any removal of it, the marks so set thereon are to be defaced in the presence of an officer of inspection or of the customs; and "every person who shall sell, or in any way alienate or remove, any cask, which has been emptied of its contents, before the marks and numbers set thereon shall have been defaced and obliterated in the presence of an officer of inspection, shall for every such offence, forfeit and pay one hundred dollars, with costs of suit."

On the 19th April, 1831, twenty-nine empty casks, which had formerly contained foreign distilled spirits, were found at the store and in the possession of the defendant, who was a general commission merchant, having been purchased since they were emptied of their contents, and the marks and numbers set upon them at the time of importation not being defaced or obliterated. On the representation of the collector of the customs, the district attorney brought suits against the defendant, to recover the penalty of one hundred dollars, accruing on the purchase or removal of each cask.

On the 27th February, 1832, the first of these suits came on to be tried before Judge Hopkinson and a special jury. The facts of the purchase of the empty casks, and of their being removed to the warehouse of the defendant, without the marks being defaced, were not denied. Evidence, however, was given

to show that he was in the habit of making large and extensive purchases of empty casks, to be sent to Messrs. H. & H. Canfield, merchants in New York, and correspondents of the defendant; that the casks in question were purchased by Mr. Campion, a clerk of the defendant, not for himself, but for and by the direction of the latter, by whom they were paid for, and from whose store they were to be forwarded to New York; but that the defendant had not given any directions in regard to the particular kind of casks, and knew not that the marks were yet upon them, until notice of the fact was given to him by the officers of the customs, by whom they were found at his store.

On this evidence, Judge Hopkinson charged the jury, that although it was apparent the law had been violated, yet as neither the purchase nor removal had been made by the defendant, the fact of his having either directed or acquiesced in the act of his agent must be established, to make him liable to the penalty; and that they must ascertain this fact from the whole evidence, and especially from the whole conduct of the defendant, from all that he had said and done. Under this charge the jury found a verdict for the defendant.

On the 30th March, 1832, a motion was made on behalf of the United States for a new trial, on three grounds. 1, That the verdict of the jury was against the weight of evidence. 2, That the verdict of the jury was against law. 3, That the court erred in charging the jury, that the defendant was not liable for the acts of his agent, if he had no direct personal agency, nor acquiesced in the acts on which the suit was founded. The motion was argued by Gilpin, District Attorney, for the United States, and Chew for the defendant.

Gilpin, District Attorney, for the United States.

The evidence on the trial was sufficient to show that the defendant was the principal person in the whole transaction. He directed his clerk to purchase these casks; he had long been in the habit of purchasing them; he must have seen them as they were placed in his store; he could not have failed to know

that the marks were still on them. It is not necessary to establish positive and explicit directions; it was his duty to see, that in employing a person to do a particular act, the law was not violated. A violation of the law produced by his neglect, and when the act was for his benefit, is to be punished as much as if done by his previous authority. The very neglect to disavow the act of an agent, when it must be well known, is an acknowledgment of its being done with the assent of the principal, and is a participation in it. If the act be criminal, this participation makes the principal equally liable with the actual offender; he may be punished criminally; à fortiori, he is subject to a mere action of debt. 1 Story's Laws, 611. Parsons v. Armor, 3 Peters, 428. Del Col v. Arnold, 3 Dallas, 333. Commonwealth v. Gillespie, 7 Serg. & Raw. 469. Bredin v. Dubarry, 14 Serg. & Raw. 27. Upton v. Gray, 2 Greenleaf, 373. State v. Heyward, 2 Nott & M'Cord, 312.

Chew for the defendant.

There are three grounds on which this motion should be refused by the court. 1, It is not a case for a new trial. 2, The section on which the suit has been brought is virtually repealed. 3, The violation of it, if culpable, cannot be charged on the defendant.

1. This is in effect a criminal prosecution; the object is to punish the defendant for a violation of a public law; a verdict in his favour is an acquittal. Under such circumstances the court ought not to grant a new trial. Especially they should not, on the ground of evidence, on any matter of fact. Now even if the view of the law taken by the District Attorney is right, it depends for its effect entirely on the view of the controverted facts taken by the jury. It is a question of evidence; and no case can be shown where on such a question, involving a serious penalty, the verdict has been set aside.

2. This provision is obsolete. The object of marking the casks was solely for the security of the revenue. It was intended to ascertain what articles were entitled to drawback. Until 1818 such a security was necessary; but it was then found

ineffectual, and another mode to attain the same object was adopted. Since the act of the 20th April, 1818, casks containing foreign distilled spirits are only entitled to drawback, by being kept in the public stores from the time of importation to that of exportation. It is now entirely immaterial, for any purpose connected with the revenue, whether the marks are erased or not. This is the sole purpose for which the law was made. It never was intended to operate against private frauds. 3 Story's Laws, 1715. Sixty Pipes of Brandy, 10 Wheaton, 421. The United States v. The Polly and Jane. 2 Hall's Law Journ. 458.

3. It is not pretended that this defendant committed the act alleged to be illegal; he certainly never did it. It is not pretended he even directed it to be done; there is no evidence of such a fact. It was not necessary for any object he is proved to have had. Now admitting that a principal is liable for a criminal act of his agent, in which he participates; yet all the facts being conceded, they do not amount to such participation.

Gilpin, for the United States, in reply.

There is nothing in this case to exclude it from the usual rule for granting a new trial; that is, a misunderstanding of the jury as to the law and facts. If there was an error in the construction given to the law, in regard to the liability of the defendant for his agent's act, which it is contended there was, then this case falls within a class of cases, where new trials have been repeatedly granted. If there was no such error, no ground exists for a new trial, and it is not asked. Wilson v. Rastall, 4 Durn. & East, 753.

As to a repeal of the law, it is certainly not express, for none is to be found. Nor is it inferential; for although it may be true that one object of the marks on casks was to ascertain such as are entitled to drawback, yet many other objects of a public nature and connected with the revenue might be pointed out, and no doubt were intended to be provided for. It is part of the general system for collecting the revenue on wines, spirits and teas; it cannot set aside without changing essentially

numerous regulations and provisions: to do this by such a sweeping and sudden repeal, never could have been intended: to effect it by a mere construction of a section of a law, which does not contain the least allusion to such an intention, is going farther than this court can authorise.

On the 31st March, Judge HOPKINSON delivered the following opinion:

This suit is an action of debt brought to recover the penalty given by the forty-fourth section of the revenue act of 2d March, 1799. By that it is enacted, "that on the sale of any cask, chest, vessel or case, which has been or shall be marked pursuant to the provisions aforesaid, as containing distilled spirits, wines or teas, and which has been emptied of its contents, and prior to the delivery thereof to the purchaser, or any removal thereof, the marks and numbers which shall have been set thereon, by or under the direction of any officer of inspection, shall be defaced and obliterated in the presence of some officer of inspection, or the customs;" and any person "who shall sell, or in any way alienate or remove any cask, chest, vessel or case which has been emptied of its contents, before the marks and numbers set thereon, pursuant to the provisions aforesaid, shall have been defaced or obliterated in the presence of an officer of inspection, as aforesaid, shall for each and every such offence forfeit and pay one hundred dollars."

On the trial, a verdict was rendered for the defendant in conformity with the charge of the court, and a motion has been made, on the part of the United States, for a new trial, grounded on the following reasons.

1. That the verdict is against the weight of evidence.

2. That it is against law.

3. That the court erred in charging the jury that the defendant was not liable for the acts of his agent, if he had no direct personal agency in them, nor acquiesced in the acts on which the suit is founded.

The power of the court to grant a new trial in a penal action

when the verdict is in favour of the defendant, has been argued at the bar. Upon this subject, in the case of Wilson v. Rastall, (4 Durn. & East, 753,) Lord Kenyon says: "It has been said that if we grant a new trial in this case we shall innovate on the practice of those who have gone before us; but that was more easily asserted than proved; for there is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the judge. Where, indeed, the jury have formed an opinion on the whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion; but where a mistake of the judge has crept in and swayed the opinion of the jury, I do not recollect a single case in which the court has ever refused to grant a new trial." The chief justice of course lays all the cases of indictments out of the question, because they are criminal cases; but he considers this a civil action. Judges Buller and Grose concurred in this opinion. The question was moved again in the case of Calcraft v. Gibbs, (5 Durn. & East, 19,) and Lord Kenyon repeats his former opinion.

The first objection to the verdict then, if true, would not be a reason for a new trial. But in fact the verdict is in full accordance with the evidence, if the court was right in the law which was given to the jury. This is the only real point on this motion. The evidence was, that the casks in question came to the store of the defendant when he was absent from the city. The witness who testified this fact was the clerk and bookkeeper of the defendant, and he further says, that he does not think the defendant ever saw them. The witness did not know where they came from; they were brought to the store by a porter, under the direction of Mr. Campion; he believes Mr. Campion purchased them, and paid for them, and shipped them to New York. Mr. Campion was acting as clerk to the defendant. He was purchasing casks; but the witness could not say whether for himself, or for defendant, or for both. The defendant followed the commission business. These casks were introduced into the books of defendant as shipped for him to New York.

The questions of fact resulting from this evidence were, of course, left to the jury; that is, whether the casks belonged to Mr. Campion or the defendant; for whom were they purchased; who was the real owner of them; whether the purchase was made by Mr. Campion for the defendant, as his agent and on his account; whether the purchase and removal of them in violation of the law occurred without the knowledge, direction or acquaintance of the defendant? I instructed the jury that if in their opinion the defendant had no agency in, or knowledge of the purchase and removal of the casks, nor any acquiescence in the illegal proceedings by his agent, although he might be the owner in whole or in part of the casks, he was not liable to the penalties of the act; but the punishment should be visited on the offender, or the person who actually sold or removed the casks in violation of the law. Such are the words of the act of congress; and unless the acts of an agent, in such a case, can be imputed to his principal, although unauthorized by him and unknown to him, the instruction of the court was right.

The case relied upon by the District Attorney, to sustain his objection to the verdict, seems to me to be all sufficient to support it. It is the case of The Commonwealth v. Gillespie. (7 Serg. & Raw. 469.) It was an indictment for selling lottery tickets, not authorised by the laws of the commonwealth. The opinion of the Supreme Court of Pennsylvania, delivered by Judge Duncan, on the point we are considering, is found in page 477. He says; "The evidence was, that a lottery office was kept in a house rented by Gillespie in this city, for several years, under a sign in the name of Gillespie's Lottery office; that Gregory, a young lad, acted as his servant or agent in that office, and sold the ticket produced in evidence, a New York Literature Lottery Ticket, and endorsed in the name of Gillespie; a lottery not authorised by the laws of the commonwealth; that Gillespie occasionally visited Philadelphia. I did not instruct the jury," said Judge Duncan, "that Gillespie was criminally answerable for the act of his agent or servant, but I left them to decide whether, from the whole body of the evi-

dence, Gillespie was concerned in the sale of the ticket." The Judge, after stating the evidence, continues: "these were circumstances from which the jury might infer his participation in the sale of the ticket." The Judge afterwards proceeds: "If they found he had not participated in the transaction, they were instructed to acquit him." In my charge to the jury I directed them, that the defendant was not liable for the acts of the agent, unless he had some agency in or knowledge of them; which is certainly not so strong as the language of Judge Duncan, that the jury must acquit unless they found the defendant "had participated in the transaction."

On general principles of responsibility of one for the acts of another, the defendant cannot be answerable, penally or even civilly, for acts not done by his direction, by his authority, with his knowledge, or within the scope of his authority. In the case of Parsons v. Armor, (3 Peters, 428,) referred to by the District Attorney, it is said that "the general rule is, that a principal is bound by the acts of his agent no further than he authorises that agent to bind him." It is truly added that "the extent of the power given to an agent is deducible as well from facts as from express delegation." In Paley's work on agency, (p. 226,) "the responsibility of the master for the servant's negligence, or unlawful acts, is limited to cases properly within the scope of his employment." This is the rule as to a civil liability, and the case given is that of an action brought against the owners of a ship for goods lost by the carelessness of the master: there, judgment was given for the defendant, because it did not appear that the ship was actually employed to carry goods for him, for Lord Hardwicke remarked that "no man could say that the master, by taking in goods of his own head, could make his owners liable." It is no doubt true, as stated by Paley, that "if a man employ an agent in the commission of a fraud, he is clearly liable for it himself, as if a goldsmith, by his servant, puts off counterfeit plate, or a taverner corrupts wine." It is added, that "employers are also civilly liable for frauds committed by their agents, without their authority, if done in

their employment;" but by that I understand, not merely that the agent was employed by the principal for some purposes, but in the business in the prosecution of which the fraud was committed. If I employ one as a house servant, and he commits a fraud by forging my name, I am not liable for it. The agency must have some relation with the subject of the fraud.

The utmost length to which any of the cases have carried the responsibility of a principal for his agent, is to compel him to make satisfaction civilly for an injury done to an innocent person, by the fraud or misconduct of the agent acting by his authority or in his employment. It is very clear, that this principle does not reach the case of a suit for a penalty under an act of congress, or under the circumstances which have been given in evidence in the case in question. If the defendant kept a commission store, the person who purchased and removed the casks was his clerk; and not employed by him, as far as we know from the evidence, to purchase casks or any thing else for him, much less to do so in violation of the act of congress. There was no error in the court's instruction to the jury, that the penalty could not be visited upon the defendant, unless he had some agency in the illegal transaction, or some knowledge of it. The offender against the law, was the person who purchased and removed the casks, without having the marks and numbers first defaced and obliterated according to the provisions of the act of congress; and he must answer for the offence who alone was guilty of it.

This is sufficient to decide the motion for a new trial, but it may be well to notice another matter that has been set up in the defence, for the purpose of correcting the error on which it is founded. We have seen that the suit was brought on the forty-fourth section of the act of 2d March, 1799. It seems to have been the opinion of the defendant, that the provisions above alluded to, ordering that the marks and numbers on the casks shall be defaced and obliterated, are superseded and repealed, by the act of 20th April, 1818; "providing for the deposit of wines and distilled spirits in public warehouses;" because it is

enacted by the act, "that no drawback shall be allowed of the duties paid on any wines or spirits, unless such wines or spirits shall have been deposited in public or other stores, under the provisions of this act, and there kept, from their landing to their shipment." A constructive repeal of the former provisions is asserted, on the argument that the directions for obliterating the marks were made, only to prevent frauds in obtaining drawback on wines and spirits not imported, but put into casks in which wines or spirits had been imported, and having the custom house marks and numbers as evidence of such importation. It is altogether a mistake. The provisions of the act of 2d March, 1799, are in full force. There is no direct repeal of them, and an argumentative repeal must be much stronger than that now urged, before it should receive any attention. It is plain that other objects may have been in view, other frauds intended to be prevented, by directing the obliterations of the custom house marks from casks which have been emptied of their imported contents, besides the protection of the revenue against fraudulent claims of drawback.

It is not necessary to be more explicit upon so plain a point; but as the error is probably not confined to the defendant, I have thought it expedient to take this occasion to correct it.

The MOTION for a new trial is refused.

## The United States of America
*v.*
## John F. Sarchet.

1. The court have no right to give the jury any direction upon questions of fact, but it is their duty to call their attention to particular points, and to observe upon the tendency, force, and comparative weight of conflicting testimony.
2. In the construction of laws relating to trade and commerce, such as those of 20th May, 1824, and 19th May, 1828, the vocabulary of merchants is to be adopted in preference to that of mechanics.
3. To authorise the entry of small pieces of bolt iron, under the name of 'chain links,' it must be proved that they have been previously known in commerce by that name.
4. Where a piece of bar or bolt iron has been changed by subsequent manufacture, it ceases to be subject to duty as such, although it may not have become a new and distinct manufacture, or assumed a new name or use.

On the 5th January, 1831, John F. Sarchet, imported into the port of Philadelphia, by the ship Alexander, from Liverpool, fifty-six sheet iron casks containing small pieces of round iron, from three to eight inches in length, and about half an inch in diameter. They were invoiced and entered at the custom house as hardware, and the duties were calculated at the rate of thirty-seven dollars a ton, being the rate of duty chargeable on "rolled bar or bolt iron" under the provision of the act of 19th May, 1828. The whole amount of duty on the invoice amounted to four hundred and sixty-six dollars and ninety-one cents, for which three bonds were given. The first of these, for one hundred and fifty-five dollars and ninety-one cents, became due on the 5th September, 1831, and not being paid, the present suit was brought to recover that sum with interest.

On the return day, at November sessions, the defendant in open court, the United States attorney being present, made an affidavit that an error had been committed in the liquidation of

the duties demanded upon the bond. He specified as the error alleged to have been committed, "that the invoice of iron upon which the said duty had been assessed, was estimated as bar or bolt iron, manufactured in whole or in part by rolling, at thirty-seven dollars per ton, instead of being estimated as a manufacture of iron, not otherwise specified, in the act of 22d May, 1824, and therefore as paying an ad valorem duty of twenty-five per cent.; or as scrap iron and therefore paying a duty of sixty-two and a half cents per hundred weight." Upon this affidavit the court granted a continuance.

On the 12th March, 1832, the case came on for trial before Judge HOPKINSON and a special jury. Numerous witnesses were examined on the part of the United States, and also of the defendant, with a view to prove the character and designation of the articles mentioned in the invoice, both as an object of commercial traffic, and as the subject of manufacture to a greater or less extent. It was argued by GILPIN, District Attorney, for the United States; and CADWALADER for the defendant.

GILPIN, for the United States.

In this case, an invoice of articles was entered by the defendant at the custom house, in Philadelphia, as 'hardware.' On inspection they were found to consist of pieces of round iron, perfectly straight, varying from three to eight or ten inches in length, and from less than half an inch to more than three quarters of an inch in diameter. They were appraised as pieces of "bolt or bar iron, made by rolling," and the duty was charged at the rate of thirty-seven dollars a ton, pursuant to the second clause of the first section of the act of 19th May, 1828. This prescribes, "that, from and after the first day of September, 1828, in lieu of the duties now imposed by law, on the importation of the articles hereinafter mentioned, there shall be levied, collected, and paid the following duties; that is to say; first, on iron, in bars or bolts, not manufactured in whole or in part by rolling, one cent per pound; second, on bar and bolt iron, made wholly or in part by rolling, thirty-

seven dollars per ton." The only question in the case is one of fact, whether or not these articles, which, it is admitted are made by rolling, ought to have been appraised and charged as 'bar or bolt iron.' They are so considered by the officers of the customs, men experienced and disinterested. To confirm this, the evidence of merchants largely engaged in the importation of iron; of American manufacturers of a similar article; and of practical mechanics, who use it as a material for various purposes, has been produced. This testimony supports the construction given by the appraisers, and is amply sufficient to justify the charge of duty which has been made. Pamphlet Laws of 1828, p. 43.

The allegation of the defendant, that these pieces are not to be considered as 'bar or bolt iron' because they are now a manufacture of iron, cannot be sustained, unless it is shown that they have changed their character, and assumed some new use and name. Every partial alteration is not sufficient; it must be such a one as converts them into some new article, adapted to a specific purpose. It has been decided that round copper bars and copper plates, although turned up at the edges, come within the provisions of the laws by which copper in bars and copper in plates are exempted from duty. More than this, it has been decided that round copper plates turned up at the edges, and invoiced by the specific name of 'raised copper bottoms,' do not lose that privilege of exemption. Can it then be said, that the mere cutting of a long bar of iron into short pieces, so changes its character as to make it a new manufacture? United States v. Kid and Watson, 4 Cranch, 1. United States v. Potts and others, 5 Cranch, 284.

But if we were to admit that there had been a change in this article, such as to prevent its being considered any longer 'bar or bolt iron,' what has it become? According to the defendant's own allegation it has become a 'chain link,' part of an iron cable or chain; and as such it would be subject to a higher duty than that now demanded. By the fifth clause of the first section of the act of 22d May, 1824, the duty to

be levied "on iron cables, or chains, or parts thereof is three cents per pound," which is equal to sixty-seven dollars and twenty cents per ton. 3 Story's Laws, 1944.

CADWALADER, for the defendant.

The first point of view, in which the consideration of this case presents itself, is, as to the construction of the act of congress, under which the right to levy this duty is claimed. That act is to be construed strictly in favour of the defendant. If not altogether a penal statute, it is in the nature of one, because penalties are imposed for its evasion.

What is the just construction to be put upon its provisions? Clearly that it means to describe, by its general commercial designation, an article, well known in commerce, which had been frequently before the subject of similar legislative provisions. The act of 1828, is but part of a series of acts relative to the levying and collecting of duties on imported merchandise. In all of them, iron of this character is referred to. In the act of 27th April, 1816, it is referred to as "iron in bars or bolts;" in that of 20th April, 1818, it is called "iron in bars and bolts;" in that of 22d May, 1824, it is designated as "iron in bars or bolts;" and finally in the act of 19th May, 1828, it is described as "bar and bolt iron." All these expressions denote one and the same commercial article; they are illustrative of one another; and the term "bar and bolt iron," in the last, means the "iron in bars and bolts" alluded to in the previous acts. It is a well established rule, that words of a general signification in a statute, which are in juxtaposition with other words of a more confined and limited sense, are to be understood according to the more limited sense. If there were no such rule, the words in these several acts of congress, all evidently referring to the same subject matter, would impose it upon us. The law of 19th May, 1828, meant to tax an article, namely, bar and bolt iron, which had been more particularly described in the previous laws as iron in bars and bolts; an article well known to commerce. There was no intention to tax a new material, but simply to

increase an existing duty. In order therefore to subject the articles, which are the object of the present controversy, to the duty imposed on them, they must be iron in bars or bolts. That they are not so, simple inspection, independent of evidence, sufficiently establishes. 3 Story's Laws, 1589, 1706, 1944. United States v. Tenbroeck, 2 Wheaton, 248. United States v. Goodwin, 4 Mason, 128. Stradling v. Morgan, Plowden, 204. Wiseman v. Cotton, 1 Levinz, 79. Waller v. Travers, Hardres, 309. Stevens v. Duckworth, Hardres, 344. Crowley v. Swindles, Vaughan, 173. Gale v. Reed, 8 East, 80. Miller v. Heller, 7 Serg. & Raw. 32.

These articles therefore, not falling within the description of "bar and bolt iron," as contemplated by the act, and not being a mere raw material, must be either scrap iron, or a manufacture of iron. They bear more resemblance to the former, than to any among the various articles of iron described in the act, but being prepared for a specific purpose, do not perhaps strictly fall under that designation. They are in fact a manufacture of iron not enumerated, and as such embraced in the fifth clause of the first section of the act of 22d May, 1824, which declares that there shall be levied "on all manufactures, not otherwise specified, made of iron, a duty of twenty-five per cent. ad valorem." The term bar or bolt iron, is not used in the act of congress as descriptive of a manufactured article; it is not so considered either in commerce or by the mechanic; it is in fact the raw material of the blacksmith. If therefore it undergoes any ulterior process, such as being cut, bonâ fide, for a specific purpose, it ceases to be this raw material, it ceases to retain its former denomination, it ceases to be liable to duty as an article so known and denominated. This would be true whether or not it acquired any other known name. It might remain a nondescript, an article partly manufactured, but having ceased by a process of manufacture, however incomplete, to be what it was before, it acquires a new character, by which the duty chargeable is to be regulated. Such is the fact here. It has been proved that these bars of

iron, have been cut into pieces, bonâ fide, for the purpose of making chains or chain cables. This has been done in the regular course of manufacture, and it has therefore terminated their character as bar or bolt iron.

But the evidence enables us to proceed a step farther. They have not merely ceased to be bar or bolt iron; they have become a manufactured article, known in commerce. It has been settled that under the revenue laws, the commercial designation of an article of import, is that by which it is to be taken, in estimating the duties. Now these pieces of iron are known in commerce, and among those who deal in them, as 'chain links.' They are imported as such. They are to be used for certain purposes of manufacture. It is immaterial whether or not they agree in form or appearance with what is meant by the term 'link' out of the trade. It is sufficient that they bear that name, among those who use them. That they do so has been proved. It is no answer to say they are 'parts of a chain cable;' for that term is well known also in commerce, as designating not a single link but certain portions, some fathoms in length, into which cables are necessarily divided.

The result therefore is, that these pieces are not bar or bolt iron; but that they are a manufacture of iron not specified, and subject to a duty of twenty-five per cent. ad valorem, which the defendant has been always willing to pay.

Gilpin, for the United States, in reply.

Admitting the view of the several acts, which is taken by the defendant, to be correct, it does not sustain the inference drawn from it. Although it may be true, that "bar and bolt iron," in the last law, embrace the same article as the "iron in bolts and bars" designated in those previous, yet it does not follow that the former is to be construed solely by the latter. It may be true that more precise words sometimes control such as are general, but it is incumbent on him who would restrain the general words, to show that the particular words do of necessity restrain them, and were used intentionally for that purpose. Now such is not the case here. The act con-

taining the more enlarged description was subsequently passed. The inference is, not that it was to be limited by what went before, but that what went before was to be extended by it; that if the term "iron in bolts and bars" was susceptible of an interpretation, which did not include every species of "bar and bolt iron," then such limitation should be removed. But were it otherwise, what is there to exclude these pieces from the description of "iron in bars and bolts?" The length of the bars or bolts is not specified, and, though short, they are unquestionably bars. If not, they are at least pieces of bars, and of course subject to the same duty as the whole bar would be, unless there is a distinction in the commercial character of pieces of iron, according to their length, which no evidence has established. There is nothing therefore in the construction or comparison of these several acts, which exempts the articles in question from duty, either as "iron in bars or bolts" or as "bar or bolt iron," unless its character has been changed by subsequent manufacture.

The real and sole question therefore is, whether each of these pieces of iron has become "a manufacture of iron" not specified in the law. In the first place it is to be observed that it is not so imported; it is designated in the invoice not as a particular manufactured article, but generally as hardware, a term broader than "bar or bolt iron." But admitting that these pieces were imported to be used for a specific purpose, and had been partially prepared for it, surely that is not sufficient to change their character; bolt or bar iron may be so prepared and so imported, but it continues to be what it origi nally was, until it is actually converted into a new and specific article. Every alteration does not confer on it a new character as a manufacture; if so every ingredient in every form would be an object of distinct designation and charge. To consti tute a new and different article, it must be so changed as to have a positive and specific use in its new state. It must not only cease to be a piece of "bar and bolt iron," but it must be an article completely manufactured for, and applicable to, some

distinct and positive use. The force of this seems to be admitted by the defendant, when he attempts to prove each of these pieces of iron to be a 'chain link.' Whether he has done so or not, is a matter of fact for the jury. That it is not a link in the common acceptation of the word will hardly be denied; and the evidence of the merchants, manufacturers, and mechanics, in our opinion, establishes the same thing. It never has acquired the character of a commercial article designated by a fixed name; it is simply a piece of bolt or bar iron prepared for an ulterior purpose, but until it is used for that purpose it does not assume a new designation, or become a specific object of trade. It continues to be bolt or bar iron until it becomes a 'chain link,' and the mere fact of importing it for that purpose, or the mere intention of so applying it, does not operate to convert it into the new 'manufacture.' When it has become part of a chain, or capable of being used as part of a chain, it is then the article which the defendant asserts it to be, but not before.

And when it becomes so does it not at once fall within the fifth clause of the first section of the act of 22d May, 1824? Is it not to all intents and purposes "part of an iron cable or chain?" The very assertion that it is a 'chain link,' seems to admit that it must be 'part of a chain.' The construction, by which it is attempted to limit this expression, has no foundation either in the words or apparent intention of the law. There is no conceivable reason why it should relate to a greater or less number of links; no particular length or number is designated; the object was to lay a duty on chain cables, and chains manufactured wholly or partially abroad; and surely this intention would equally relate to long or short chains, to such as were in one piece, in several pieces to be afterwards united, or in links to be fastened together here. The convenience of transportation, or the difference of profit, may justify the merchant in importing them, in one form or the other, but the manufactured article is the same, and is fully embraced by the broad and general phrase used in the law. If

therefore these pieces have ceased to be pieces of "bar or bolt iron;" they have become chain links, and, as such, parts of a chain, which are subject to an amount of duty, even higher than that claimed in this suit.

Judge HOPKINSON delivered the following charge to the jury:

The general question in issue is, to what rate of duty, under the revenue laws of the United States, are certain articles of iron or hardware subject, which were imported by the defendant into this port in January, 1831? The acts of congress impose various rates of duties on iron of various kinds or descriptions, and it is for you to decide under which of these descriptions the importation in question falls. 1. Is it bar or bolt iron? On this article the law of 19th May, 1828, lays a duty of thirty-seven dollars per ton, and this is the duty claimed by the United States in this suit. 2. Is it scrap iron? On this article the duty is sixty-two and a half cents per hundred weight. 3. Is it part or parts of an iron cable or chain? On this the law of 22d May, 1824, lays a duty of three cents per pound. 4. Is it a manufacture of iron, not specified in the acts of congress? If so it is subject to an ad valorem duty of twenty-five per cent; and this is contended for by the defendant.

The controversy then is mainly between the first and the last descriptions; between the bar or bolt iron, and a manufacture not enumerated in the law. Scrap iron seems to be put out of the question by the evidence on both sides. It appears to be neither old iron worn by use, nor pieces of new iron which remain of a large bar, cut or divided for some particular purpose, but too small for the purpose intended. As to the iron cable, or chain, or parts thereof, a good deal of contradictory evidence has been given. At present this may be put aside. It is insisted upon by the United States rather as an alternative, than a direct claim. The real demand in this bond and in this action is for a duty on the articles in question, as bar or bolt iron. The substantial and real allegation of the

defendant is, that they are a manufacture of iron not specified under any of the descriptions of iron mentioned in the act.

Your inquiry will be, to ascertain whether these articles are embraced by the description of bar or bolt iron, as used and intended by the act, or whether they fall under the general head of non-enumerated manufactures of iron.

You will observe that it is incumbent on the defendant, on the ground he has taken, to bring them under the clause of the law he contends for, and show not only that they are not specified in the act, but that they are a manufacture of iron. He contends that they are so; that they are so known under the denomination of chain links; so known as an article of commerce. You have seen that the pieces of iron produced are of several kinds; some of them are straight, but cut from the bar in certain lengths, and nothing more done to them; some are also straight, but sloped at the ends; and some are twisted or bent, but not closed at the ends. The last kind, however, you are not now called to decide upon; the importation in question being of the straight pieces only. The defendant contends that these are all equally known as chain links; that chain links are nowhere mentioned or specified in our revenue laws; and therefore that they are a manufacture of iron not enumerated, or subjected to a specific duty. Whether these pieces of iron, cut into various lengths, of various diameters and shapes, are, truly speaking, nothing more nor less than bar or bolt iron, cut into short pieces, but not thereby changing their name and character, nor thereby becoming a new and different manufacture of iron; or whether, by this operation or process of cutting, for a particular object, that is, for the purpose of making chain links, they ipso facto become a new and different manufacture of iron; whether, in the language of commerce, they become chain links, and are so received and known by those engaged in the iron trade; these are the questions you are to decide, for they are questions of fact, to be determined by the evidence you have heard.

It is not my right or desire to give you any direction upon

such questions, but it is my duty to assist your inquiries as to particular points, to which your attention should be specially directed; to observe upon the tendency and force of the prominent facts given in evidence, and the comparative weight of conflicting testimony. This I shall do briefly and generally, although the witnesses have been unusually numerous and their examination has occupied several days.

1. The defendant insists, that these pieces of iron are known as an article of commerce, by the name of chain links. Has he supported this pretension? Has he shown that they have been an article of commerce under that or any other name; that is, under any name descriptive of a known manufacture of iron? Is he not the only person in the United States who has imported them as a distinct, acknowledged manufacture of iron from the bar, as chain links? It is true that one of the witnesses, Amos Noe, a blacksmith and not an importer, says that he knew chain links to be brought from the Peru Iron Works, in the state to the city of New York, and also from England to Philadelphia; but as to the latter, he admitted it was only by Mr. Sarchet. We have no description of what they were, whether like these we have before us, or in a perfect and finished state; nor how they were brought in, whether as a separate article called chain links; whether they were so invoiced or not, so entered at the custom house or not. Of all these matters the witness knew nothing. The same remarks may be applied to the testimony of Washington Jackson, who says he never knew an article of commerce called chain links, but that some were offered to him for sale by an Englishman; the offer was made here and the article was in New York, and Mr. Jackson never saw it. I presume if such importations of chain links were made, eo nomine, or by any specific name of manufacture, other than that of bar iron, the books of the custom house at New York would show it, and would show how they were entered, and received and charged with duty. You will judge whether the articles before you have been known in commerce as chain links, and have been so imported into the United States by any body but

the defendant. I should perhaps notice the examination of witnesses before a committee of congress at Washington, in which chain links are mentioned as a known article; certainly they are; they have been known as long as chains have been known, whose parts have always been called links; but the question remains whether the name has ever been applied to such articles or pieces of iron as are now in dispute. That the link of a chain is a manufactured article and has always had that name, cannot be doubted; but you are to inquire whether the pieces before you have or have not been comprehended or classed under that name. 2. Supposing, however, that the defendant has failed in showing that these things are known in commerce as chain links, he may nevertheless make out his case and bring himself within the provision of the act of congress, if he has shown that these articles, in their present state, are a manufacture of iron, are manufactured chain links, as he alleges them to be; for when he asserts that they are a manufacture, he must tell you what they are; and he has undertaken to prove that they are, in the language of the trade, or the nomenclature of those who ought to be depended upon for information on this point, manufactured chain links, so considered and known.

Upon this subject you have had the benefit of the experience and opinions of three classes of dealers in iron: 1, Mechanics; 2, Merchants; 3, Manufacturers. To which of these classes should you look with the most confidence for information? You have been truly told by the counsel for the defendant, that this is a question of construction of a law relating to trade and commerce; a commercial question. It is certainly so. It would seem to follow from this that the vocabulary of the merchant, of the importer, of the counting house, would be most safely adopted, and not that of the mechanic, of the smith's shop. May you not also put your faith on the manufacturer, the maker of the article, for its appropriate character and name, rather than on the mechanic, who turns it to a new use? All trades have their peculiar names for things, peculiar phrases in their busi-

ness; a sort of shop short-hand, well understood in the shop, which may be very different from the denomination of the article in the orders and invoices of merchants, or in the usage of the manufacturer, or in common parlance. The shoemaker may say to his journeyman, when he hands him a piece of leather, take this and cut out a shoe; but is it a shoe as soon as cut? The blacksmith may say, take this bar or rod and cut a linch-pin; but is it a linch-pin as soon as the piece intended for the linch-pin is cut off and separated from the bar? So of a horse-shoe, and other articles made in a smith's shop.

I. What have the mechanics testified? Seven were called by the defendant. 1. John Sarchet. You will take his testimony with such allowances as his peculiar situation in this cause may suggest to you. He says, he has always heard these pieces called links; that they are the raw material of a chain. 2. William Corkley calls them links. 3. William Pritchett calls those that are bent chain links; does not know any other name for the straight ones. 4. Luther Stebbins says when they are cut expressly for links he calls them links. 5. Amos Noe calls them all links, and never heard them called any thing else. 6. Samuel Hulse would call all the articles links, but will not say as to the straight ones. 7. Joseph Riter calls it a link when cut. 8. Wesley Blackman says they are links. These are all the mechanics called by defendant: they do not all agree in respect to the straight pieces. I should add that all of them but one have worked or are now working in the shop of the defendant. I mention this, not to impeach their credibility, but that you may consider how far they have derived their knowledge and opinions from the practice or language of the defendant's shop. You will also keep in mind that they, or some of them, speak of their knowing these pieces by this name at other places than his shop, or than this city. On the contrary, several mechanics, one of them largely concerned in chain making, testify that they have never heard such pieces of iron called chain links. Their names and testimony must be in your recollection. Allowing credit to all these witnesses, the result

would seem to be, that the name of a link, given to these pieces of iron, although used in some shops, and by some mechanics, is not universal; is not known to and adopted by all the trade.

We may remark that all these witnesses agree; and, indeed, it is obvious to your own inspection, that these pieces are not in fact links, that is, perfect links; that they cannot be used as links without a further process of manufacture. The straight ones must be bended, and the bended ones must be welded, before they can become links of a chain for the purposes intended. They have passed the first process of a manufactured link, of a manufacture different from the bar from which they were cut. Are they therefore a manufacture, are they links? These are inquiries you are to make, and to satisfy yourselves in the result. It has been strongly argued by the defendant's counsel, that these pieces were exported, bona fide, for the purpose of making chains, and he concludes from this that they may be called links, or at least a distinct manufacture, not specified in the act. Is not the basis of this argument too broad? If a bar of iron should be cut, in England, into pieces suitable to make a horse shoe, and should be really exported for that purpose, could it therefore be a new manufacture, under the name of a horse-shoe, for which it is intended, or under any other name?

II. I will next call your attention to the evidence of the merchants, or importers of iron. 1. Joseph R. Evans says none of these articles answer the denomination of bar iron. He should call the bended ones chain links, but is doubtful as to the straight ones. He does not know what name is to be given to them. They could be made into spikes and so could the crooked ones. He has never imported any cut iron, or any cut into links. But he says there is no difference between the straight pieces and the bars, except that they are cut into pieces. 2. William Welsh never imported any iron, his father occasionally imports it; he never heard bar iron called so, when cut into pieces for a particular purpose; he would call none exhibited to him bar iron, except the long bar. 3. George Handy never heard of such an article in commerce as

chain links. 4. William Thomas sees nothing here that answers the description of bar iron but the long one. The crooked pieces are links unwelded, the others pieces of rod iron cut off. It is iron cut off for links, and he would call it a piece of rod iron. When a rod is cut up, it loses its quality of bar iron and becomes pieces of iron. 5. Edward Carpenter says the long piece is bar iron but none of the short ones. He would call them pieces of bar iron, but not bar iron. 6. Robert S. Johnson would call the flat piece, 'a piece of bar iron.' He imports bar iron of all lengths, from the shortest pieces to a long bar. The small pieces come with bundles to make up the weight. He never made an importation of small pieces and would not receive them. He does not know chain links as an article of commerce. These are pieces of bar iron, though not bars of iron. 7. Thomas Haven says it requires length to make a bar. A bar that is broken is called a piece of a bar; when cut, a bolt; if bent, a hoop. Has never received bolt iron, less than seven feet long; nor bar iron less than eleven. In this country three feet long, and upwards. He never heard such a piece called a link. He would not enter them as chain links, or as bar iron, but probably as pieces of bars. There is no article of commerce called chain links, and he never heard of their being imported. 8. Samuel Spackman understands bar iron to be of the usual length. A small piece would be called 'part of a bar of iron.' He never heard of these links imported. He should not call the straight ones links, but part of a bar or bolt, and the twisted ones, pieces intended for links. 9. Henry Cope, by bolt and bar iron, understands long bolts or bars which are straight. He should call a short one a piece of bolt iron. So far the witnesses for the defendant. 10. John Steel, a custom house officer, says they do not estimate the duties on bar or bolt iron by the length. It is usually from ten to fifteen feet. It does not lose its character by being short. He does not consider it to be a manufactured article by being cut; he considers it as bolt iron, hoop iron, or prepared for hoops, but not closed and

welded. So iron prepared for rail roads is punched with holes. 11. Edward Smith considers the small straight pieces to be short bar iron. He would enter them as bolt iron. They might be applied to many purposes. They were sent short because so ordered. Bolt iron is of various lengths. Varieties of articles of various shapes are sold as bar iron. If a bar of iron were cut into pieces in England, it would still be bar iron. Hoop iron, rolled out thirty or forty feet and cut shorter and doubled up, is still hoop iron and pays the duty as such; it is not considered as a manufacture of iron. He orders bar iron of different lengths, for the fore and hind wheels of a wagon, but they are not therefore a manufacture, because cut for that purpose. 12. Washington Jackson calls the straight pieces, pieces of round iron, of bolt iron, not chain links. He should not call them a manufactured article if not finished for a particular purpose. He never knew them as an article of commerce. If he wanted bar iron of a shorter length, he would order it as bar iron of a certain or required length. 13. Thomas M. Smith calls the straight pieces, bolts of iron; the bent ones, bent bolts. If he was to import straight pieces cut into lengths, he would enter them as bar iron. He has imported hollow tire iron, to an order, and paid duty as common iron. This is all the testimony of the commercial interpretation of the terms bar iron, bolt iron. Some of these witnesses are both importers and manufacturers; you will remember which of them stand in this double capacity, if you shall think it of importance in considering their evidence.

III. The last class of witnesses is the manufacturers of iron, the forge masters as they have been called, who manufacture iron from the ore to the bar; but not beyond that. It is made into pigs, into blooms, and into bars, which is the third state or process of manufacture.

The weight and value of the testimony of these witnesses is impeached on the ground, that as they do not manufacture the iron beyond the bar, they know nothing of these links, or of what is or is not a link, which is a process of manufacture

beyond or from the bar. You will judge of the efficacy of the argument, but I may remind you that it is to those manufacturers that orders go from the importer, and that the language of the importers, the commercial name of an article, should be known to the manufacturers, or they would not understand these orders. They must have a common vocabulary as to the things in which they deal together; and in this respect, are both separated from the mechanics or blacksmiths, who buy their iron as they may want it for particular purposes, and have their own manner of designating these purposes, and giving their due orders to the workmen of their shops. It is also to be remarked, that if these iron masters are not judges of what may be called a link, because they do not make it, they are specially competent judges of what is considered to be a bar of iron, or bar iron, it being their business and daily experience to make it, and to sell it as a known article of merchandise. It has also been urged upon them that they have an interest in this question, and are in fact the true and real plaintiffs in the cause; it is at the same time admitted that the blacksmiths have a common cause on the other side, and it is said they are the real defendants. You have seen and heard all the witnesses, both manufacturers and mechanics, and probably know all or most of them, and can therefore judge for yourselves how far their testimony has probably been influenced by the interest they may have.

The manufacturers of iron are unanimous in their allegations, that these pieces of iron are not chain links; that they are not a manufacture of any description, other than bar iron cut into small pieces, which does not change their quality, their character, or their denomination. 1. Edward Smith, a merchant and manufacturer, considers the small straight pieces to be short bar iron; he would enter the round ones at the custom house as bolt iron. They might be applied to many purposes. To show that the mere act of cutting a long piece of iron into smaller pieces, does not change its character or name,

he says, that hoop iron is rolled out into pieces thirty or forty feet long, and then at the same factory, cut into such lengths as may be ordered, but it is still hoop iron, not a hoop, although prepared for one. Sometimes, he says, the holes are punched at the end, still it is not a new manufacture, nor as such entered at the custom house. You may remember here what was said of rail road iron, which are bars of iron, cut into the required lengths, and holes punched in them; they were nevertheless considered to be bar iron, or iron in bars, and paid duty accordingly. 2. Samuel Richards would call these things, pieces of bar iron, both bent and straight; he often sells pieces three or four feet long, each is called a bar. Many articles are bought and sold as bar iron, which are not in bars. Should he receive an order for a ton of bar iron three feet, and another fifteen feet long, he would suppose they described the same article. 3. Benjamin Reeves calls the small one a piece of rod and the thicker one a piece of bolt iron. He does not know what to call the large twisted pieces. The shortness of a piece of bar or bolt iron, does not change its character. He often sells short pieces as bar or bolt iron. Many articles are considered as bar iron, that are not straight bars. 4. Andrew M. Jones would call the thick one, a piece of bolt iron; the thin, a piece of braziers' rod; the bent ones, pieces of bent round iron, but not at all a separate article of manufacture. He should import it as bolt iron. The shortness does not change the character of the article. He has cut several tons into harrow teeth and invoiced them as square bar iron. 5. Clement M. Buckley, calls it a piece of bolt iron, a braziers' rod. The bent piece is a piece of bolt iron bent for the purpose of making a link. The shortness of the piece does not change its character, it retains its character of bar iron. He rolls bars from twenty to thirty feet long, and then he cuts them. The cost is trifling. He cuts them sometimes to suit his wagon, sometimes into short pieces two feet long, to make sheet iron; it is nevertheless, known as bar iron, although cut expressly to make sheet iron. He would furnish one hundred

tons cut into pieces of six inches long, for the same price as long bars.

These witnesses concur in testifying that these pieces of iron are not chain links; that they are bar or bolt iron cut into short pieces, and in no other respect differing from the long bar and bolt iron; and that this difference of length does not change either the character or denomination of the article. And this is what you are to decide, on a fair and intelligent consideration of all the evidence on the one side and the other.

If you should be of opinion that they are not chain links, that they are not a new and distinct manufacture, that they have not assumed a new name or use in their present state, but you should also think they are not iron in bars or bolts, or bar iron, they would then be subject to a duty of fifteen per cent. under the general provision of the law of 27th April, 1816, unless you can consider them as part of an iron cable or chain. Upon this there has been much contradictory testimony. Literally speaking a link or two links are a part, a constituent part of a chain, which is made up of many links. But it is alleged that, technically speaking, a part of a chain or iron cable, consists of a length of fifteen or twenty feet long, connected by what are called shackles. There is certainly a difficulty under the law in admitting this signification of 'part of a chain.' The act intends to put a much higher duty on an iron cable or chain, or part or parts thereof, than on bar iron. But if it may be brought in pieces of ten feet long, and without shackles, it will not pay the duty on iron cables because it is neither an iron cable or chain nor part of one. It will not pay even the duty of bar iron, because it is a manufacture of iron from the bar, not enumerated and specified in the act; and thus a manufacture evidently intended to be heavily taxed, will come in for a very low duty of twenty-five per cent. ad valorem.

It is for you to decide whether these pieces of iron are chain links, and if so, are they parts of a chain cable, and if not parts of a chain, can they be chain links. If you shall

reject them as links, and also as parts of a chain or iron cable, are they bar iron? You will observe that the clause of the act of congress under which the thirty-seven dollars per ton is claimed by the United States, uses the terms "on bar or bolt iron," not on "iron in bars or bolts," as in the preceding clause and in other acts. You will naturally inquire whether this change in the expressions is inadvertent or intentional; is meant to describe the same or a different article. If the same, why is the phraseology changed? If different, in what does the difference consist? By 'bar iron,' are we to understand, a particular description of iron; in a certain state of manufacture; iron of a certain quality, kind, and character? Should you be told that an article was made of bar iron, would you understand that it was made of iron of a certain character and quality, as distinguished from pig iron, from bloom iron, from cast iron, without any reference to the shape, size or length of the bar or piece of iron from which it was made? On the other hand, should one speak of a bar of iron, or of iron in bars, would you not suppose he had reference to their form, shape, size and length? It has been proved that plough shares and sickles, or other articles of manufacture, are properly called bar iron; they are bought and sold by that name; but could we say that they are bars of iron, or iron in bars? If we could not, there would seem to be a difference of meaning in the two forms of expression used in the same act of congress, unless this difference is controlled by other parts of the act. To give you another illustration of the effect of this change of phraseology. If we were to speak of a pig of iron, or of iron in pigs, would we not mean iron of a certain known quality or manufacture, in pieces called pigs; thus describing both the character of the iron, and the ordinary size and shape in which it is made? But if we were to speak of pig iron, would we not intend to describe or signify the particular quality and kind of that iron, without any reference to its size or shape? If we had in our hand a piece of iron six inches square, we might say this is pig iron, but could we say this is

a pig of iron, or, if more than one, iron in pigs? These are questions for your consideration so far as you shall deem them to be material, in deciding the issue you are trying.

If then the terms 'iron in bars,' and 'bar iron,' in truth, in their common and proper understanding, as they are taken by commercial usage, do mean and intend the same thing, I would understand them also to mean the same description of iron, the same article of merchandise, in the act of congress. If, on the other hand, they have different significations, the one meaning merely the quality of the iron, and the other iron of the same quality in a particular form, we must so understand the act of congress; we must presume that congress understood the language they have adopted, as it is properly and commercially used and understood; and therefore that when they changed their expressions from "iron in bars or bolts" to "bar and bolt iron," they intended also the change of description imputed by the change of expression.

The defendant's counsel has endeavoured, with great industry and skill, to navigate his case between the bar iron on the one side, and the parts of an iron cable on the other, and to show you that chain links are neither the one nor the other. It is a narrow strait, but, it may be, not impassable. This you are to determine. He must not have the article to be bar iron, but a manufacture from it called a chain link, and intended for a chain cable; and yet this chain link must not be a part of a chain cable, or he falls into a greater misfortune than with the bar iron. It must be neither a bar of iron, which it originally was, nor part of a chain which it is intended to be, but something between them, with a known destination, name, and use. It will hardly meet Mr. Buckley's definition, who says, "an article that is completed and fit for some use, and known by some name, I call a manufactured article."

I submit the whole case to you; the questions in it are questions of fact, to be decided by the evidence you have heard. Your judgment must be on that evidence. Certainly on the construction of the law contended for by the defendant, chain

cables may be brought here, in separate links, requiring only to be connected and welded, at a much lower duty than bar iron; while a chain cable or part thereof is subjected to a much higher duty. If, however, this be the fair construction of the act, or if it be a defect of the act, the defendant is entitled to the advantage it gives him.

I ought to add that this bond is given for the straight pieces only, and therefore your verdict will have a reference only to them. You are not now called upon to decide upon the bended or twisted pieces.

The Jury found a verdict for the United States, for one hundred and sixty dollars and ninety-seven cents.

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## Peter Brower, Zoeth Keen, and Jacob Hess
## v.
## The Schooner Maiden, Joseph Baymore, Master.

1. Where a seaman, who has signed shipping articles, voluntarily absents himself from the vessel, in a port of the United States, an entry may be made in the log book and his wages forfeited, according to the provisions of the fifth section of the act of 20th July, 1790, or he may be apprehended and detained in gaol until the vessel is ready to proceed on her voyage, according to the provisions of the seventh section of that act.
2. Where a seaman is apprehended and detained in gaol until the vessel is ready to proceed on her voyage, he does not forfeit his wages, but the cost of his commitment and of his support in gaol is to be deducted from them.
3. The charge for a person necessarily employed in the place of a seaman, who has voluntarily absented himself, and has been apprehended and detained in gaol, is to be deducted from his wages.

On the 1st December, 1831, the libellants shipped for a voyage from Philadelphia to Wilmington, in the state of North

Carolina, and back to Philadelphia at the wages of fourteen dollars a month. On the 2d December, the vessel left this port and proceeded as far as Chester, on the Delaware river, where, owing to the quantity of floating ice, she was obliged to make a harbour. Here she remained ice-bound and unable to continue her voyage for forty-five days. While she lay at Chester, the libellants left the vessel and returned to Philadelphia. They alleged, as the cause, that the weather was extremely severe, so as to endanger them with being frost bitten; and that they came to represent their situation to the owners, offering to return to the vessel and complete their contract, as soon as the season permitted. While in Philadelphia they were apprehended, and committed to prison as deserters, by a justice of the peace, under the seventh section of the act of 20th July, 1790. They were afterwards taken from prison, by the captain, returned on board the vessel, performed the voyage, and arrived at the port of Philadelphia on the 8th March, 1832.

The respondent declared in his answer, that the accommodations of the vessel were quite sufficient for the comfortable protection of the crew, and that he had suffered much loss owing to their absence, as well as that it had made the detention of the vessel longer than it would otherwise have been. He therefore prayed a deduction from the wages of the libellants; 1. For the expenses of the imprisonment; 2. For loss by the detention of the vessel; 3. For the amount paid to persons hired in their places. He further contended for a suspension of the wages of the libellants during their confinement.

On the 17th March, 1832, the case came on to be heard before Judge Hopkinson. It was argued by Haley for the libellants, and Grinnell for the respondents.

Haley for the libellants.

The following cases were cited: 1 Story's Laws, 104. Abbot's Ship., 135. 146. 353. 463. Bordman v. The Elizabeth, 1 Peters Ad. Dec. 129.

Grinnell for the respondents.

The following cases were cited: Abbot's Ship. 464.

Thorne v. White, 1 Peters Ad. Dec. 168. Bray v. The Atalanta, Bee, 48. Luscomb v. Prince, 12 Mass. Rep. 576. 579.

Judge HOPKINSON delivered the following opinion:

The men have not shown a good cause for leaving the ship. It was their duty to remain with her, for her care and preservation, and to be ready to sail, on the first chance, on her voyage.

The question then is, to what penalty, forfeiture or deduction of wages are they liable for their desertion? It was at the option of the master, when they left the ship, to enter their desertion in the log book, according to the provisions of the fifth section of the act of 20th July, 1790, (1 Story, 104,) or to have them committed to prison, and detained until the vessel was ready to sail, under the seventh section. He chose the latter. The effect of the first proceeding would have been a forfeiture of all the wages then due to the seamen, and a termination of the contract with them. The effect of the second is to continue the contract in force, and detain the men in prison in order to compel their performance of it. When they are taken from prison to the vessel, and sail with her, no new contract is made with them, but both parties proceed under the original shipping articles. In truth, even while in prison, the seamen are in the custody of the captain; they are at his disposal, and may be taken out at his pleasure; and they are so taken out when the vessel is ready to sail. He is allowed to confine them in gaol on shore for his convenience and their safe keeping; but they are, nevertheless, as much his prisoners as if they had been confined on board of his vessel. When seamen are confined on board, for any misconduct or disobedience, has it ever been pretended that their wages stop, or are forfeited during their confinement? I know of no such case. Their imprisonment is their punishment, and a forfeiture of wages has not been added to it. If the forfeiture of wages is the object, the manner of effecting it was pointed out by a preceding section in the law; an entry must be made in the log book of the time of absence; without that

no forfeiture or suspension of wages is incurred by an absence and a subsequent return to duty. No entry was made in this case; and if the forfeiture or deduction now claimed against these men were allowed, the consequence would be that seamen, deserting a vessel, and at large during their desertion, would be entitled to their wages on their return; while those who were suffering in a gaol would, in addition to this punishment, lose their wages accruing during their imprisonment. Under the seventh section of the act, no such forfeiture or deduction is given; the confinement and the cost of the commitment is the only penalty declared. This principle is adopted in the case of Bray v. The Atalanta, (Bee, 48,) and I know of no judicial decision which impeaches it.

Another question has been moved in this case: whether the money paid for the support of these men in gaol, may be deducted from their wages. Does it come under the words of the act, which provides that the men are "to be delivered to the master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner?" The word 'costs' seems to have a technical meaning, and is usually applied to the legal charges of a proceeding; but the word used in the act is 'cost,' and its large and full sense means 'charge, expense, loss, detriment.' In this sense it will cover the item in question. These men were wrong-doers, they violated their contract, and this expense was incurred in consequence of the violation. They are not entitled to any extraordinary indulgence or effort to save them from the consequences of their wrong; but a liberal construction should be given to the act to restrain the mischief intended to be prevented. At all events, it was money paid for them, on their account, without which they would have suffered by the privation of food, and they could not be restored to liberty until it was paid. It is true that the captain was bound to maintain them, but only on board of the vessel, and not when they left her without his leave, and were on shore, either in a place of their own seeking, or where their own misconduct made it necessary to put them.

We must presume that this vessel was provided with all necessary stores for the crew, and if the owner must also pay for their boarding in prison, the expense is doubled upon him.

It is my opinion that the libellants are entitled to their wages while they were in prison, but that there must be deducted from these the cost of their commitment, including their support in gaol, the amount paid to the men hired in their place, and the stage hire for taking them down to Chester to the vessel.

| | | |
|---|---|---|
| The amount of wages claimed is - - - | | $114 02 |
| From which are to be deducted | | |
| The cost of commitment and support, | $22 44 | |
| The pay of the man hired, - - - | 15 00 | |
| And the stage hire, - - - - | 2 25 | |
| | | 39 69 |
| | | $74 33 |

Decree. That the libellants do recover from the respondent the sum of seventy-four dollars and thirty-three cents, with costs.

THE UNITED STATES OF AMERICA

*v.*

TWENTY-THREE COILS OF CORDAGE, THREE BOLTS OF RAVENS' DUCK, AND FOUR PIECES OF SAIL CLOTH, FOUND ON BOARD OF THE SHIP ELIZA.

1. Where articles are purchased abroad for a vessel, to be used as part of her equipment, they are not sea stores within the meaning of the act of 2d March, 1799.
2. Where articles purchased abroad for the equipment of a vessel, are not used and remain on board at her arrival in the United States, they need not be reported by the master in his manifest.

ON the 3d December, 1831, an information was filed by the attorney of the United States, against twenty-three coils of cordage, three bolts of ravens' duck, and four pieces of sail cloth, found on board of the ship Eliza. It appeared that they were the residue of a purchase made at Cronstadt, as was alleged, for the use of the vessel during the homeward voyage. The vessel was regularly entered at the custom house on the 7th November, 1831, the manifest of her cargo was delivered to the collector but contained no account of these articles, nor were they included in the report of sea stores, not intended for merchandise or sale. On the 28th November, the cargo was entirely discharged. On the following day the articles in question were found remaining on board. They were seized by the officers of the customs, and were alleged to be forfeited on the ground that they were sea stores, and not so specified or designated in the report or manifest of the master of the vessel.

On the 2d April, 1832, Thomas and William Haven filed a claim to the articles seized, and denied that the same were liable to seizure or forfeiture.

On the 3d April, the case came on to be heard before Judge

HOPKINSON. It was argued by GILPIN, District Attorney, for the United States, and J. S. SMITH and CHAUNCEY, for the claimants.

GILPIN, for the United States.

The act of congress of 2d March, 1799, is intended to provide for the collection of duties on all articles, coming from a foreign country. Its provisions are most minute and comprehensive; they direct the mode of collecting all duties due, and of ascertaining exactly when foreign goods are exempted from them. They divide all foreign articles imported into three classes; first, merchandise; second, baggage; third, stores. Under one or other of these, all articles are embraced. For each class there is a particular form of report to be made by the master at the custom house on his arrival. Not only is such report requisite under the law, but its necessity as a revenue provision is apparent. 1 Story's Laws, 606. 612.

These articles are neither merchandise nor baggage. They are sea stores. They were so spoken of by the master. They were purchased for the use of the vessel; a portion of the quantity so purchased was used and has become part of her tackle, apparel, and furniture; these are not yet so used; they clearly remain as necessary stores of the vessel. They are articles so designated in naval language; they are classed for instance, as marine stores with anchors and cables in the British navigation laws. They are comprehended, in commercial instruments, among the stores necessary for a vessel to perform her functions. If they are not sea stores then is there no provision whatever in regard to them; no means designated to ascertain whether or not they are superfluous, whether or not they are exempt from duty; but an extraordinary omission, to which there is no other similar, has existed in the whole revenue system. Abbot's Ship. 416. 2 Holt's Ship. 248. Marshall's Ins. 181. 225.

Did the master comply with the law relative to these superfluous stores? It declares that, "in order to ascertain what articles ought to be exempt from duty as sea stores, he shall

particularly specify them in his report." This has not been done. It further declares that "if any greater quantity of articles are found on board than are specified in the entry, they shall be forfeited and may be seized." Here the fact that these articles were not entered or reported is admitted. It is also admitted that they were found on board, some time after the cargo was entirely discharged. They are therefore liable to seizure and must be forfeited. 1 Story's Laws, 612.

J. S. Smith and Chauncey, for the claimants,

The great object of the revenue laws is to secure the payment of duties on merchandise, and to prevent frauds. This is not merchandise; it was not bought as such, it is not to be sold as such. There is not the slightest imputation or allegation of fraud.

This seizure has been made by the officers of the customs on a ground purely technical, and it cannot be sustained. These articles are not sea stores according to the meaning of the law. This has been already decided; a cable landed from a vessel without a permit, was seized on the same ground, and judgment was given by this court for the claimant; there is no distinction between a cable and the cordage and sail cloth now in question. Nor are they sea stores on a fair construction of the act of congress; that evidently refers to the provisions and supplies for the crew and passengers; it is a phrase frequently found in other acts of congress, which show that such is its signification. This is the proper test, not the mercantile use of the terms in commercial instruments, even if that ever applied it to such articles as those now in question, which does not appear to be the case. The occasional use of the phrase in a foreign statute is no proof of general maritime usage. 1 Story's Laws, 103. 106. 593. 599.

In fact these articles are part of the tackle apparel and furniture of the vessel. They are like her anchors, yard arms, and spars. Are all the spare anchors or spars sea stores? The law under which this forfeiture is claimed refers to revenue cases, and is meant to protect the revenue. This case is not one of

that class; these were not dutiable goods, but articles bought bonâ fide for the use of the ship, and intended to constitute part of her rigging and equipment.

GILPIN, for the United States, in reply.

The act of 2d March, 1799, was not a mere revenue law; at least not a mere law to collect revenue, it was meant quite as much to prevent evasions. Is baggage subject to duty, or are cabin stores? They are not, yet they are expressly referred to and must be entered. The slightest excess must be specified. It is therefore evident that congress meant that their officers should examine all articles; that they should ascertain what was exempt. The claimant's construction gives this privilege, not to the officer of the government, but to the owner or master of the vessel; thus substituting an interested party for a disinterested public officer. It establishes a provision different from all the rest of the revenue system. Who is to judge of the quantity of these articles that is necessary? If bought bonâ fide for the use of the vessel they are not merchandise; and if not sea stores they are then free from all inspection. They may be introduced in any quantity; they may be used for rigging the vessel entirely anew; and the owner of the vessel may be placed in a position of unfair advantage over every person in the United States, obliged to purchase or use a similar article.

On the 6th April, 1832, Judge HOPKINSON delivered the following opinion:

The information in this case charges that the articles above mentioned, on the 29th November, 1831, were found on board the ship Eliza, whereof William Haven, Jr. was master, as sea stores, which had not been and were not included in the report and manifest delivered on oath to the collector of the port of Philadelphia by William Haven, Jr. the master, on the 7th November, 1831.

The twenty-third section of the act of 2d March, 1799, directs that no goods shall be brought into the United States, from

any foreign port, in any ship or vessel belonging to a citizen or inhabitant of the United States, unless the master shall have on board a manifest in writing, signed by him. The act goes on to prescribe with great particularity what the manifest must contain, concluding the enumeration with the words, "together with an account of the remaining sea stores, if any." By the twenty-fourth section of the same act, goods not included in the manifest are declared to be forfeited; but this section has no bearing on the case before the court, as the articles now in question are not informed against as goods not included in the manifest, but as sea stores not reported.

This prosecution is founded on the forty-fifth section of the law, which enacts, "that in order to ascertain what articles ought to be exempt from duty, as the sea stores of a ship or vessel, the master shall particularly specify the said articles, in the report or manifest to be by him made, designating them as the sea stores of such ship or vessel:" and he is to declare on oath that they are "truly such and are not intended by way of merchandise or for sale." If the quantities are excessive, the collector is to estimate the amount of the duty on the excess, which shall be forthwith paid by the master. The act then proceeds, "and if any other or greater quantity of articles are found on board such ship or vessel, as sea stores, than are specified in such entry, or if any of the said articles shall be landed without a permit, all such articles as are not included, as aforesaid, in the report or manifest, shall be forfeited, and may be seized." It is under the enactments of this section that the present prosecution has been instituted. It relates to the sea stores of the ship, and provides for two cases: 1st, When the stores are duly reported in the manifest, but it shall appear that the quantities are excessive; and in that case the duties are to be estimated on the excess, and paid by the master. 2d, When articles are found on board the vessel, as sea stores, which are not included in the manifest, all such articles are forfeited; and it is on this ground that the United States claim the forfeiture of the articles in question. They were certainly found on board of the ship,

after the report and manifest were made to the custom house, and they are not included in that report. If, then, they are sea stores within the meaning and intention of the act of congress, the law has been violated and the articles are forfeited.

The same question arose in the case of an information against a cable, tried and decided a short time since, in this court. That trial was by a jury, the seizure having been made on land: this is by the court, the seizure having been made on board of the vessel. It was my opinion in the former case, and the verdict was in conformity with it, that articles purchased for the ship, to be used as part of her tackle and apparel, as part of her equipment, for her navigation, cannot be considered as her sea stores, sometimes designated as the "vessel and cabin stores;" but that these stores mean the provisions taken on board for the use of the passengers and crew, and not such articles as the anchors, cables, spars and cordage of the ship. I will not now repeat the reasons given for this opinion in the charge to the jury; I have carefully reviewed it, and find no cause to change it. I therefore, think that the articles mentioned in the present information were not a part of the sea stores of the Eliza; that the master was not bound to report them in his manifest as such; and, consequently, that the prosecution against them as such cannot be supported.

A question has been agitated in the argument of this case, on which I do not find it necessary to give any opinion; that is, whether a ship of the United States may take on board, at a foreign port, any quantity of articles, such as cordage, for the use of the ship, beyond what she can require for the immediate voyage she is about to proceed on, and may lay in a supply of such articles for as many subsequent voyages as the master or owners may think proper. The quantity cannot change their character, and turn them into sea stores; if unauthorised, they ought to be proceeded against as cargo or merchandise; but whether justly or not I do not intimate an opinion.

In the present case I have no doubt that the articles in question were truly purchased for the use of the ship; the objection

is to the quantity. As to the ravens' duck and the sail cloth, the evidence is satisfactory, I believe uncontradicted, that the quantities were not more than such a vessel, by ordinary usage, would take for her voyage home. As to the twenty-three coils of cordage, there is more doubt about the necessary quantity in relation to that voyage; but they were truly intended for the ship when purchased, and actually used on board of her, part in coming home, and the rest in fitting her out for her next voyage, or during that voyage.

I mention these things to remove any impression of a fraudulent or illegal design on the part of the master of this ship, in omitting to report these articles in his manifest; and not because they are of any importance to the principle on which the case is decided.

Decree. That the information be dismissed and the goods restored to the claimants.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

MAY SESSIONS, 1832.

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### THE UNITED STATES OF AMERICA
*v.*
### TWENTY-EIGHT PACKAGES OF PINS, IMPORTED IN THE SHIP MONONGAHELA.

1. The affidavit of a party interested, taken without cross examination, is competent evidence on a motion for an order on the opposite party, to produce books and writings, under the provisions of the act of 24th September, 1789.
2. A court of chancery, on a bill of discovery, will not compel a party to produce evidence which would subject him to a forfeiture.
3. A proceeding in rem is not within the provisions of the act of 24th September, 1789, which authorise an order to produce books and writings, on the trial of actions at law.
4. Where an information has been filed under the provisions of the act of 28th May, 1830, against articles alleged to be falsely charged in an invoice, the court will not grant an order on the claimant to produce the invoice on the trial of the cause.
5. To subject goods to forfeiture for a false valuation in an invoice, it must have been produced at the custom house for the purposes of an entry.
6. To make up a false invoice at the place of exportation, with intent to defraud the revenue, is not an offence against the law, until followed up by an actual attempt to use it for the purposes of an entry.
7. The sole object of the laws of impost is the collection of the duties; they are not intended for the punishment of crimes.

ON the 17th December, 1831, an information was filed by the attorney of the United States, against twenty-eight packages of pins imported in the ship Monongahela, from Liverpool, which were alleged to be forfeited, on the ground, that 'the

invoice thereof was made up with intent to evade and defraud the revenue,' contrary to the provisions of the act of congress of the 28th May, 1830, relative to goods subject to ad valorem duty. Pamphlet Laws of 1830, p. 105.

On the 17th January, 1832, William C. Cardwell and John Potter, for and on behalf of Kirby Beard and Kirby, of London, filed a claim to the goods in question. They also denied the allegation that any invoice thereof was made up with intent to defraud the United States; and submitted, that as no entry of the goods had been made, they were not liable to forfeiture, even if that allegation were true.

To this claim and answer a general replication was filed on behalf of the United States.

On the 28th May, 1832, the attorney of the United States applied to the court for "an order on the claimants and their agents, to produce, at the trial of the above cause, the original invoice of the goods, wares, and merchandise, mentioned in the information; and, on the non-production thereof, that judgment be rendered in favour of the United States of America." At the same time an affidavit of James N. Barker, collector of the port of Philadelphia, was filed, to the following effect: "That the original invoice in question was, as the deponent believed, in the possession or power of Messrs. Cardwell and Potter, the agents of the claimants; that Mr. John Potter, one of that firm, declared to the deponent, in the month of December, 1831, that he had received it and exhibited it to his counsel, and that it was then in his possession or power; that Messrs. Cardwell and Potter had been requested to produce it at the custom house, which they refused to do; and that it contained evidence pertinent to the issue joined in the case." 1 Story's Laws, 59. Geyger v. Geyger, 2 Dallas, 332.

On the 2d June, 1832, this application was opposed by Scott, on behalf of the claimants, and supported by Gilpin, District Attorney, on behalf of the United States.

Scott, for the claimants,

This proceeding is novel in its character; such an order as

that now asked for has never been made in a penal case; the object is to obtain from the claimants, evidence necessary to sustain the condemnation of their own property. The application is founded on the fifteenth section of the act of 24th September, 1789; but that refers only to actions at law; it extends only to books and writings in which the parties are interested; it looks to a person as the defendant; it extends only to cases within the similar rule of chancery proceedings; and it must be preceded by adequate notice. The present case is defective in all these respects. 1. This is not an action at law, for that term is confined to proceedings according to the forms of the common law, where there is a party to act and to be acted on; it does not embrace suits of equity, admiralty, or maritime jurisdiction. 2. An invoice is not such a written instrument as is meant by "books and writings;" a bill of discovery only lies for papers to which both of the parties have a primâ facie right, or which relate to a title of lands in dispute. 3. The act of congress expressly authorises a judgment against a person, the plaintiff or defendant, if the order is disobeyed; here there is no plaintiff or defendant, it is an information filed by a public officer against a thing; there can be no judgment, it must be a decree as to the property. 4. The ordinary rules of proceeding in chancery would not compel the production of such a paper; they never oblige a man to betray himself, or to disclose what will subject him to a penalty. This proceeding is in fact penal, and to extract papers from the party accused, is to make him a witness against himself. 5. In requiring a preliminary motion and due notice, the act means something more than an ex parte affidavit; here too it is that of the collector, a party interested in the condemnation, and entitled to part of the proceeds; this is not sufficient. 3 Blackstone's Com. 115. 1 Bacon's Abr. 46. Coke Litt. 289. 2 Fonblanque's Eq. 484. 491. Harrison v. Southcote, 1 Atkyns, 538. Bird v. Hardwicke, 1 Vernon, 109. Harris v. Lewis, Wharton's Dig. 631. Constitution U. S. Amend. Art. v. Hylton v. Brown, 1 Washington, 300. Bas v. Steele, 3 Washington,

386. Rose v. King, 5 Serg. & Raw. 245. Wright v. Crane, 13 Serg. & Raw. 450.

Gilpin, for the United States.

This is a case clearly within the spirit of the act. Cardwell and Potter became possessed of this paper as agents; they were bound by law to produce it at the custom house in fifteen days after the vessel arrived; it was sent to them for that purpose; they refuse to do so, although they acknowledge they have it, and give no reason for the refusal. This is an action at law; it is not and could not be brought under the admiralty jurisdiction of the court, for the seizure was on land; in form it is similar to the proceedings in the English exchequer which is a common law court; it is commenced by information which is an old mode adopted in suits at law; there is an issue to the country on a matter of fact; and there must be a verdict of a jury; besides, this court is bound to administer the common law remedy where there is one, that is, to adopt the common law forms, the action at law, as it does in this instance. This invoice is certainly within the letter of the act, for it is "a writing containing evidence pertinent to the issue." Nor is there any difficulty in the court rendering a judgment against the parties, who are the United States and the claimant; judgment of non-suit can be entered against the former, and of default against the latter; and though the right of property is determined thereby, it is not more so than in actions of detinue or replevin; the first stage of proceeding is in rem, but when the claimant appears and issue is joined, the suit continues between the parties; the property may be delivered to the claimant on bond as in replevin. It cannot be said that the production of this paper will criminate the claimants, or that it is such a one as is prohibited by the rules of chancery, for the claimant must suffer on account of a fraudulent intention; the invoice does no show this, but merely the fact of valuation, it does not show whether it is too high or too low, whether it is made intentionally or accidentally wrong; the cases cited, are where the fact disclosed, of itself

subjected the party to a penalty. Besides this paper is unlawfully in possession of the claimants, it belongs to the United States; and this precludes them from setting up any ground of privilege; it is exactly a case where chancery would interpose. The notice and proof given are sufficient to found the order upon; if possession is denied, then farther proof may be required; the affidavit of the collector is no more ex parte than the bill of a complainant in chancery, under his own oath. The cases cited for the claimants establish the sufficiency of the affidavit in this stage of the proceeding. 1 Story's Laws, 56. The Sarah, 8 Wheaton, 394. Reniger v. Fogossa, Plowden, 1. Weaver v. Meath, 2 Vezey, 108. Finch v. Finch, 2 Vezey, 492.

Judge Hopkinson delivered the following opinion:

The question to be decided in this case is one of entire novelty, and considerable importance. It arises on the construction of the fifteenth section of the act of congress of the 24th September, 1789, "to establish the judicial courts of the United States." Neither the counsel at the bar, nor the inquiries I have made since the argument, have been able to discover any judicial decision or practice, which affords us any aid in determining the question.

The case is this. An information has been filed against certain pins and needles, imported into the United States from England, and it is charged that they have become forfeited to the United States, by reason of a false valuation in an invoice, made up with an intent to defraud the revenue of the United States. A claim has been put in by Cardwell and Potter as agents for Kirby Beard and Kirby, the exporting house in England, and the cause is in order for trial. The invoice, alleged to contain the false valuation, has never been produced at the custom house, and, of course, no entry of the goods has been or can be made, while it is withheld. The District Attorney, nevertheless, proceeds for the forfeiture, under the fourth section of the act of 28th May, 1830, by which it is enacted that "if any package or in-

voice be made up with intent, by a false valuation, to evade or defraud the revenue, the same shall be forfeited." On the trial of the issue under this information, the production of the invoice alleged to be false, will be required; and in order to obtain it, the District Attorney has taken a "rule on the claimants to show cause, why an order should not be made on them and their agents to produce, at the trial of the cause, the original invoice of the goods mentioned in the information; and on the non-production thereof, that judgment be rendered in favour of the United States." This order is claimed of the court, under the fifteenth section of the act of 24th September, 1789, above referred to.

As a ground for this motion, the District Attorney filed, in the first instance, the following affidavit: "James N. Barker, collector of the port of Philadelphia, being duly sworn according to law, deposes and says, that the original invoice of the twenty-eight cases of pins and one case of needles mentioned in this information, is, as this deponent believes, in the possession and power of Messrs. Cardwell and Potter, the agents of the claimants; that Mr. John Potter, one of the said firm of Cardwell and Potter, declared to this deponent, in the month of December, 1831, that he had received the said invoice, and exhibited the same to his counsel, and that it was then in his possession and power; that the said Messrs. Cardwell and Potter have been requested to produce the same invoice at the custom house of this port, but have refused so to do; and that the same does, as this deponent verily believes, contain evidence pertinent to the issue formed in this case."

An objection was made to the sufficiency of this proof, inasmuch as the deponent is a party interested in the condemnation of the goods, being entitled to a certain portion of the forfeiture. I had no doubt, in looking at the authorities, that there was nothing in the objection; that the affidavit of the party is competent for this purpose; and that the affidavit may be taken ex parte without a cross-examination. Such has been the practice of the State courts, as well as of this court; and as the party on whom

the call is made, may extricate himself from the difficulty by making oath that he has not the papers required of him, he cannot complain.

The ground being thus laid by the United States, by reasonable proof of the possession of the papers by the claimants, and of their contents, to show that they are pertinent to the issue, the question comes up, which has been argued at the bar, to wit: whether the case is comprehended within the terms and meaning of the fifteenth section of the act of 24th September, 1789. As the decision of the question must turn on the language and intention of the whole section, every word must be carefully attended to. The section is as follows: "That all the said courts of the United States shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same, by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books and writings, it shall be lawful for the courts, respectively, on motion, as aforesaid, to give judgment against him or her by default."

Several of the phrases of the act have been commented upon, with great minuteness, to show that its provisions cannot be applied to a prosecution for a penalty or forfeiture; and a strict construction is demanded, because the enactments are highly penal. I do not find it to be necessary to notice all the criticisms that have been made on the language of the law. There are some broad lines of description sufficiently definite, in my opinion, to direct us to the decision of the case. The courts of the United States have a power given to them, to require parties to produce books and writings in their possession or power, which contain evidence pertinent to the issue, "in cases and

under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." Is this such a case? Would a court of chancery, on a bill of discovery, compel a party to produce evidence which would subject him to a forfeiture? I think not. No such order has been shown by a court of equity; and the authorities that have been referred to, hold a different doctrine.

In Fonblanque's Treatise on Equity, (p. 495,) speaking of the objects of a court of equity, in enforcing discovery, it is said; "It may also happen that the situation of the defendant may render it improper for the court to enforce a discovery, as when the discovery might subject the defendant to pains and penalties, or to a forfeiture, or to something in the nature of a forfeiture." A reference is made to Mitford's Treatise on Equity, for a clear and comprehensive view of the same subject.

In the case of Harrison v. Southcote, (1 Atkyns, 528,) the bill sought for a discovery of the defendant, whether S. was not a person professing the popish religion, before he conveyed the freehold and copyhold estates to the defendant, as a purchaser thereof. The Lord Chancellor (p. 538) says, "it is not pretended that the defendant is a papist himself, therefore no penalty could fall upon him on that account: but yet he insists, if he should discover the person, under whom he bought, was a papist, it would defeat his title. To be sure, in general, by the determination in the case of Smith v. Read, it is settled, where there is a plea of a title derived, voluntarily or by a devise, from a papist, and not suggested to be a colourable trust, that by reason of the penal law, which would attach upon him, from the incapacity of the devisor to devise, the defendant shall not be compelled to discover, whether the person, under whom he claims, is a papist." The Chancellor goes on to say; "The rule of law is that a man shall not be obliged to discover what may subject him to a penalty, not what must only." Although it should not appear with certainty whether the discovery would create a forfeiture, yet if it eventually may do

so, it is sufficient to protect the party from a discovery. Thus it would seem that the penal consequences, which may fall upon the claimants, by the production of the invoice called for by the United States, make it a case not within the provisions of the act of congress.

There is another part of the act, which describes the kind of suit or action, to which the law was intended to be applied, and brings us to the question whether a proceeding in rem is within its provisions. I mean a proceeding merely and exclusively in rem throughout, and not when parties come in after its commencement, after which the suit is no longer altogether in rem. The act directs, that "if a defendant shall fail to comply with such order to produce books and writings, it shall be lawful for the courts, respectively, on motion as aforesaid, to give judgment against him or her by default." This part of the law clearly looks to a person as defendant, against whom a judgment by default may be given, and may be enforced by execution. Can any such judgment, in form or effect, be rendered in a case like that before us? The United States assert that the goods mentioned in the information have been forfeited for the causes therein set forth, and have thereby become the property of the United States. Certain persons come in and deny the forfeiture, and claim the goods as their property. But they are not substituted as defendants in the cause. It stands, in this respect, as it did before the claim was put in. The goods are brought under the authority and control of the court, and two parties appear to claim them, and the judgment of the court is to decide to which of the claimants they rightfully belong. The action or proceeding of both is upon and against the goods in the custody of the court, and there is, legally speaking, no party defendant in the case. If the issue be decided in favour of the United States by the verdict of a jury, or by a judgment for default of any appearance or adverse claim, what is that judgment? Simply that the goods are forfeited for the causes set out, and are accordingly condemned; and the consequence is that they are ordered to

be sold, and the proceeds to be distributed according to law. All these proceedings are exclusively against the property, the thing, and not against any person or party defendant whatever. If I were to grant the order moved for, and the claimants on the trial should refuse to obey it, how could I follow the directions of the act; how inflict the penalty appointed for the default? Where is the defendant against whom I could render the judgment required? Could I forfeit and condemn the goods? The act gives me no such authority. Such a judgment might act upon the rights and property of innocent persons, not before the court; for the claimants may, in truth, have no property in the goods, they may belong to other persons.

If then the claimants may be considered as a party defendant in this cause, they are protected from the order prayed for by the chancery principles referred to: and if they cannot be considered as defendants, they are not within the provision of the act of congress.

The motion of the District Attorney is denied; but he may give his notice to produce the papers he wants, and if they are not produced or accounted for, he will have the advantage of the refusal or neglect before the jury, independent of the provisions and remedies of the act of congress.

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On the 10th January, 1833, the case came on for trial. The evidence, on the part of the United States, consisted of the original report and manifest of the cargo of the Monongahela, delivered to the collector at Philadelphia on the 9th November, 1830, wherein the packages mentioned in the information were described as consigned to Cardwell and Potter; of a permit on the 27th November to land those packages (not being claimed) and take them to the custom house; and of a bill of the inspector on the same day, showing they had been accordingly landed

and taken there. Witnesses were also called to prove that the packages had remained in store ever since, in the place appropriated to unclaimed goods; that no invoice thereof had been produced, or entry of them made at the custom house; that a formal notice had been served on the attorney of the claimants on the 31st December, 1832, to produce at this trial the original invoice, which was not done. It was then testified, on behalf of the United States, by Edward Ewing, an assistant appraiser, that John Potter, one of the firm of Cardwell and Potter, by whom the claim was made in this case, on behalf of Kirby Beard and Kirby, had expressly declared, that he had the invoice in question, but would not produce it; that the value of the pins, as stated in the invoice, was similar to that stated in the invoice of the pins imported in the Alleghany, which were forfeited for a false valuation; and that these packages were of the same quality as those. It was also proved, that a subpœna duces tecum had been duly served on John Potter, requiring him to attend at this trial and bring the invoice with him; but he made default and never appeared. It was admitted, on the part of the United States, that they had no evidence of any other invoice of the goods in question, nor of the production of any invoice at the custom house, nor of any entry of the goods having been made or offered to be made. The claimants offered no evidence whatever on their part.

The case was argued by Gilpin, District Attorney, for the United States, in support of the information, and by Scott and J. R. Ingersoll for the claimants.

Gilpin for the United States.

The consignors of these goods committed the violation of the law in sending a false invoice with them, and they must take the consequences of that act. When goods, subject to ad valorem duty, are imported, if they are accompanied with an invoice fraudulently made up, the forfeiture accrues. On this principle the revenue laws have been founded, from the beginning of the government; they consider the invoice as a necessary title deed, as it were, of all goods, and have uniformly guarded its correct-

ness, and punished its falsification. Independently of any entry, the invoice is made the subject of numerous provisions, in almost every revenue law from 1789 to the present time. Whenever goods are imported into the United States, they are to have a true invoice, and, if it is wanting, satisfactory reasons must be given by the importer before he makes his entry. The act of 1st March, 1823, is the most elaborate and complete law relative to ad valorem goods; it is the result of much experiment; the thirteenth section, which provides the penalties for fraudulent invoices, looks simply to the importation, not to the entry; if the goods are imported, and the invoice that accompanies them be false, then fifty per cent. is added to their appraised value, to be paid as a penalty. The act of 28th May, 1830, is supplementary to this; it changes the penalty to forfeiture; it refers to goods imported, and subjects any package of such goods, made up with intent to evade the revenue, to forfeiture; it is the fraudulent making up of the package and the importation, not the entry, which constitute the offence. 3 Story's Laws, 1887. Pamphlet Laws of 1830, p. 105. The Robert Edwards, 6 Wheaton, 188. The Schooner Boston, 1 Gallison, 239. United States v. Lindsey, 1 Gallison, 365. Perots v. United States, 1 Peters C. C. Rep. 256. United States v. Lyman, 1 Mason, 482.

Here then the making up and existence of the invoice; its similarity to one ascertained to be fraudulent; the similarity of the goods mentioned in it to those already forfeited, are all proved; the possession by the agents of the claimants and their refusal to produce the invoice are also proved, and afford a legal presumption that its contents are as asserted; finally, the importation of the goods is fully proved. These facts bring the case within the law, whether or not an entry was made or offered to be made.

Scott and J. R. Ingersoll for the claimants.

The act of 28th May, 1830, is intended to punish a fraud on the United States; a mere undervaluation does not defraud them; the goods are in their possession and they can value

them as they like; but it is presenting and using a false invoice to mislead and deceive them, that is fraudulent. Here, judicially, we cannot know even that an invoice exists; none has been presented or used. This act of congress evidently presumes that the invoice exists, has been presented, and used with a fraudulent design, when it declares the forfeiture shall accrue. In this respect it is founded on all the previous revenue acts. They all require the invoice to be produced; that requisition is in full force; in no respect repealed. It is always to be produced at the time of entry or the want of it satisfactorily accounted for. Without this there can be no entry and the goods are to be deposited in the public stores. If suffered to remain there nine months without invoice or entry, they are to be sold, the duties paid, and the balance put into the treasury of the United States. The present case is exactly such as is contemplated by this provision; ample time has been given to produce the invoice and make the entry; they are not done; the goods should therefore be sold. The officers of the customs cannot substitute a new mode; they cannot sell or forfeit as they choose; the law provides for the different cases, and they must comply with it in each case; if the goods are left in their care, without invoice or entry, they must sell them; if they are accompanied with a fraudulent invoice and entry, they must seize them. Mere intention to violate the law, unless followed by an attempt to do so, cannot be punished; this attempt is not the making, but the presentation of the invoice; the use of it for the fraudulent purpose. In all cases of forfeiture for false invoices, the entry has been made or attempted, and the invoice produced. 1 Story's Laws, 623, 631. 3 Story's Laws, 1679, 1680, 1684, 1881, 1887. United States v. Riddle, 5 Cranch, 311. United States v. Crates of Earthenware, 3 Wheaton, 232. United States v. Six Packages of Goods, 6 Wheaton, 520. United States v. Sixty Pipes of Brandy, 10 Wheaton, 425. United States v. Tappan, 11 Wheaton, 419. Harris v. Dennie, 3 Peters, 304. United States v. Sixteen Packages of Goods, 2 Mason, 48, 54. Tappan v. United States, 2 Mason, 393.

United States v. May, 3 Mason, 98. Howland v. Harris, 4 Mason, 503. United States v. Ninety-five Bales of Paper, 1 Paine, 149. Goodwin v. United States, 2 Washington, 493, 503. The Tiger, 1 Journal of Jurisp. 105.

Judge HOPKINSON delivered the following charge to the jury:

The goods described in the information were sent by the claimants Messrs. Kirby Beard and Kirby, of London, to the United States, by the ship Monongahela, consigned to their agents, Cardwell and Potter of this city. The ship arrived at this port in November, 1830, having these goods on board. No invoice of them having been produced at the custom house, nor entry made, or offered to be made, within the time prescribed by law, the goods were taken possession of by the officers of the customs, and deposited in the public store house, where they now remain.

It has been testified by Mr. Edward Ewing, that Mr. Potter, one of the consignees, acknowledged to him in the spring of 1831, that he had an invoice of the pins imported by the Monongahela, but that he would not produce it until the other case was decided. The other case he alluded to was a previous importation of pins, sent by the claimants to the same consignees, by the ship Alleghany, which had been entered at the custom house, and were then under seizure for an alleged fraudulent undervaluation in the invoice.

The District Attorney having given due notice to the counsel of the claimants to produce, on this trial, the invoice mentioned by the witness, was proceeding to prove its contents, when an objection was made on behalf of the claimants. It was, however, eventually agreed, by their counsel, that the invoice and its contents should be considered as before the court for the purposes of argument, and that the question should be as to its admissibility as evidence. The District Attorney admitted that he has no evidence of any other invoice of the goods mentioned in the information than that testified by his witness Edward Ewing; and that he has no evidence of the production of any invoice of the

said goods at the custom house, for the purposes of entry, nor of any entry actually made of them. The object of both parties is to obtain the opinion of the court on a question of law, which if determined in favour of the claimants must decide the cause against the United States, and will save to the court and jury the time and labour of examining a great mass of evidence.

The question arises on the construction of the fourth section of the act of 28th May, 1830, "for the more effectual collection of the impost duties." By this section it is enacted, "that the collectors of the customs shall cause at least one package out of every invoice, and one package at least out of every twenty packages of each invoice, and a greater number should he deem it necessary, of goods imported into the respective districts, which package or packages he shall have first designated on the invoice, to be opened and examined, and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order, forthwith, all the goods contained in the said entry to be inspected; and if such goods be subject to ad valorem duty, the same shall be appraised, and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited."

On the part of the claimants it is contended, that the invoice mentioned in this law, is an invoice which has been produced at the custom house, for the entry of the goods: and that when no invoice has been there produced, nor any entry of the goods made or attempted to be made, no forfeiture accrues, but the goods are to be proceeded with, according to the directions of the revenue laws, in all cases where no invoice is produced or entry made. On the other hand it is argued, on behalf of the United States, that the cases of the non-production of an invoice, provided for by the revenue laws are those in which no invoice exists; or has not been sent with the goods by accident or mistake; but that in this case the invoice is proved

to be in existence and in the possession of the agents of the claimants; and that if the United States can prove that this invoice was made up with intent to evade and defraud the revenue of the United States, the goods are liable to forfeiture, whether the invoice has or has not been produced at the custom house for an entry. The question, in short, is whether the forfeiture inflicted by the act applies generally to any and every invoice, made up to defraud the revenue; or whether the language and true meaning of the section embrace only, the cases in which the false invoice was actually produced at the custom house, and an entry made or attempted to be made by it.

This is a case in which a court must be guarded to keep within the judicial pale; and not take a step into the legislative domain, under impulses given by the circumstances of the case. We must look closely and exclusively to what legislation has done on the subject, and be careful to do no more. The formation of a system of revenue laws is, necessarily, a work of progression, experiment and improvement. It has to provide for a continual struggle between the law makers and the law breakers; between the officers of the government, whose duty it is to enforce the revenue laws, and the importers of foreign goods whose interest urges them to invent expedients to evade them. In such a state of things, deficiencies will be discovered by experience, which sagacity could not foresee; and new legislation will, from time to time, be required, to meet new devices of evasion. We accordingly see that, from the first organisation of our government, congress have been repeatedly called upon to modify and amend their revenue laws; to add to the security of the revenue by new guards; to increase the penalties; to provide for omitted cases; and to cure doubts and ambiguities; so as to enable the courts to reach and punish the violators of the law. But the courts have never assumed the office of supplying legislative defects; and a judge should especially look to the limitations of his powers, when he approaches a case of evil aspect and bad fame.

The first rule in the construction of a statute is to look to the statute itself for its meaning and intention: and, if they be found clearly and unequivocally expressed, to go no farther. If they be not so, we may turn to other acts on the same subject, and by a full and fair view of the whole, fix and adopt a construction for a doubtful part. Our first duty, then, is to examine the law of 28th May, 1830. The information now trying is founded on it; it is laid in the words of the law, and must abide by the provisions of the law. The first three sections do not bear upon the question we are attending to. They relate to the appointment of appraisers, and the manner of making appraisements, without any reference to the invoices. Our case must be decided by the enactments of the fourth section. They are as follows: "That the collectors of the customs shall cause, at least, one package out of every invoice, and one package, at least, out of every twenty packages of each invoice of goods imported, which package or packages, he shall have first designated on the invoice, to be opened and examined, and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order, forthwith, all the goods contained in the same entry to be inspected: and, if such goods be subject to ad valorem duty, the same shall be appraised: and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension or otherwise to evade or defraud the revenue, the same shall be forfeited." There is, then, a provision, that "no goods liable to be inspected or appraised as aforesaid, shall be delivered from the custody of the officers of the customs, until the same shall have been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector." It seems to me to be impossible to read this fourth section with any other impression or belief than that the invoice, referred to throughout, is an invoice which has been produced to, and been in the possession of the collector.

There is not a phrase in the law that can have any other meaning by any form of legitimate construction. Every direction given to the collector supposes and requires him to have the invoice before him; he cannot take a step in performance of the duties imposed upon him; he cannot comply with one of the requisitions of the act, without it. He is to cause one package, at least, out of every twenty to be opened and examined, but, before he does this, he is to designate the packages, which are to be opened and examined, on the invoice. Can this be done with an invoice which he has not, which he has never seen, which remains in the desk of the consignees, and of the existence of which he knows nothing but by report?

The act proceeds: if the package, thus designated and examined, "shall be found not to correspond with the invoice." We ask, again, if he has not the invoice, how can he decide whether the package does or does not correspond with it? "Or if the package designated shall be found to be falsely charged in such invoice," the collector then, and only then, shall order all the goods, contained in the entry, to be inspected. This provision supposes not only an invoice in the hands of the collector, but an entry, at least initiate, made by and with it. After all these proceedings have been had, as preparatory to the result, the act inflicts its penalty of forfeiture of goods, subject to an ad valorem duty. But in what event is this forfeiture inflicted? When on an examination and appraisement, any "package shall be found to contain any article, not described in the invoice, or if such package or invoice be made up with intent to defraud the revenue." And where is this false valuation to be made? Certainly in the invoice. And how is the collector to know whether it be true or false if he has never seen it? Is he to be allowed to seize imported goods, not to answer for the duties, but as forfeited, for specified causes mentioned in the act, and to take his chance of finding somewhere and somehow an invoice for them, in which they are falsely charged? Or is he not, before he makes any such seizure, to have the legal, prescribed, statutory evidence of the offence, in

his power, in the manner directed by the statute? When a forfeiture for a fraudulent undervaluation of goods was ordained by this act, the proceedings by which it is to be reached, the restrictions and precautions under which it is to be enforced, were distinctly set out, and must be strictly attended to. Antecedent statutes, imposing inferior penalties for the same offence, seem to apply only to cases of false invoices produced at the custom house, for the purposes of an entry. If we do not confine ourselves to the invoice so produced, where are we to look for it? Has the collector any authority to demand of the importer an invoice for his goods, who comes not to the custom house with it? Can he officially know that he has one, when no entry has been asked for the goods? The reply would be; "You have the goods in your possession: they are sufficient to answer any demand you have against them; your security is in your hands, at your disposal, and the means of getting from it the duties of the revenue, are pointed out by the law; follow that guide, and the United States will lose nothing they are entitled to on the importation."

If the true meaning of the law be that which I have given to it, we are bound so to understand and execute it; and if inconvenient or injurious consequences result from it, the remedy must be found in another place. But let us, for a moment, inquire whether it is not right, and according to the sound principles of criminal law, that the act in question should be what I have supposed it to be. We will suppose, as was probably the case, that the invoice before us, was made up with intent to defraud the revenue, by a false valuation of the articles contained in it. Is this an offence punishable by our law? What is it but an intention to defraud; a design contemplated; a scheme formed, but not executed, for that purpose? It cannot be said that the attempt was made, but preparation for the attempt. The machinery was ready but its actual use was arrested by the consignee, to whom the operation was entrusted, but who, for such reasons as he thought good, declined to make the intended use of it. The invoice made up

with intent to defraud the revenue was withheld, and no attempt to perpetrate the fraud with it was ever made. It never was used or produced, or, as far as we know, held by the consignee for any purpose connected with the revenue, or in any transaction in relation to these goods with the officers of the customs.

The case of the United States v. Riddle, (5 Cranch, 311,) appears to me to have been a better one for the United States than this. The goods in that case had been seized, because they were not invoiced according to the actual cost thereof at the place of exportation, with design to evade part of the duties. The consignee received, with the goods, two invoices: one charging them at about one half the cost of the other, with directions to enter them by the small invoice, and sell them by the larger. Both invoices were delivered by the consignee to the collector: and, of course, one step more was taken in that case than in this. The false invoice was, at least, officially known to the collector, and lawfully in his possession. The entry was made on the larger invoice by the advice of the collector. He, nevertheless, seized the goods as forfeited under the sixty-sixth section of the act of 2d March, 1799. (1 Story's Laws, 631.) The words of that section are, "that if any goods of which entry shall have been made, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, all such goods, shall be forfeited." The goods were so far within the words of the law that they had been entered, and were not invoiced according to their actual cost, and the invoice was delivered to the collector. But Chief Justice Marshall, delivering the opinion of the court, said "the case was too plain to admit of an argument, or to require deliberation. He thought it not within even the letter of the law, and certainly not within the spirit. The law did not intend to punish the intention, but the attempt to defraud the revenue." The court, therefore, in that case, could not have thought, as has been contended here, that the making up of a false invoice, at the

place of exportation with intent to defraud, was an offence against this law, until followed up by an actual attempt to perpetrate the fraud, by the use of it at the custom house to obtain an entry. The principles of this case are substantially recognised by Judge Washington, in the case of Goodwin v. The United States, (2 Washington, 493,) which arose, also, on the thirty-sixth and sixty-sixth sections of the act of 2d March, 1799. Judge Washington says, (p. 504,) the offence consists in "the making an entry upon an invoice below the actual cost of the goods, with design to evade the duties;" and he also says, (p. 497,) "if for want of an invoice, or for any other cause, an imperfect entry is made, so that the particulars of the goods are unknown, the goods are to pass to, and remain in the possession of the collector until the particular cost or value, as the case may be, shall be ascertained, either by the exhibition of the original invoice or by appraisement, at the option of the importer." If he does not choose to exhibit his invoice the alternative is that the goods must be valued by an appraisement.

While we are bound to take the law as we find it, and the legislature must provide a remedy for any evils that may have been overlooked, we may ask, will the construction I have put upon the act of 1830, expose the revenue to losses by fraud? I think not; the revenue laws afford an ample protection against any injury from this construction of that act. We are to remember that the sole object of these laws is the full payment and collection of the duties on foreign goods: they are not intended to be a criminal or moral code, for the punishment of crimes and immoralities. In the case of Sixty Pipes of Brandy, (10 Wheaton, 425,) the supreme court declares "that the government had nothing in view but the security of its own revenue, without interfering with those devices of the mercantile world, which look only to individual profit, without defrauding the government." Can the revenue be injuriously affected by such a transaction as we have before us? Can it, in any way, be defrauded or diminished? It may be increased, inasmuch as the appraised value, made by the officers of the customs, with a

view to the duties to be estimated on it, may put that value too high; it is hardly probable that they will fall into the fault or error of an undervaluation. What is the course of proceeding in the custom house when no invoice is produced, or entry made of goods imported? It is one that precludes any possibility of fraud upon the revenue, and probability of loss to it. On the contrary, not only is the payment of all the duties fully secured, but also of all costs and charges which may attend the collection.

The first section of the act of 20th April, 1818, (3 Story's Laws, 1679,) enacted that no goods should be admitted to an entry, unless the original invoice was produced; but such goods, that is, the goods of which the invoice was not produced, were to be deposited in the public warehouse at the expense and risk of the owner; and if the invoice was not produced within the times limited by the act, the goods were to be appraised, and the duties estimated in the manner directed by the act. The act of 1st March, 1823, (3 Story's Laws, 1881,) enacts that no goods subject to an ad valorem duty, shall be admitted to an entry, unless the true invoice of the same be presented to the collector at the time of entry, or unless the same are admitted in the mode authorised and prescribed in the next section of the act. The next section enacts that when no invoice has been received of goods subject to ad valorem duty, and the consignee shall make oath of the same, the collector may, if in his judgment the circumstances of the case render it expedient, admit them to entry, on an appraisement thereof. Bonds are to be given with sufficient sureties, to produce the invoice within given periods and to pay the amount of the duties. The third section provides that when goods, imported into the United States, shall not have been entered in pursuance of this or any other act regulating imposts and tonnage, the same shall be deposited, according to existing laws, in the public warehouse, until such invoice be produced. If, after they have remained there, during the period limited by the act, no invoice is produced, the goods are to be appraised and the duties estimated

in the manner directed by the act. Power is given to the collector to make sales, before the expiration of the limited period, to discharge such duties and intervening charges as shall become due; and also to direct earlier sales of perishable articles. Thus the United States hold, in their own hands, a sufficient security, not only for the duties, but are saved from any loss by the power given to sell to pay intervening charges; as well as all articles which might perish in their possession.

The second section of this act of 1st March, 1823, contains a provision not found in the law of 20th April, 1818. By the latter the secretary of the treasury is authorised, if he thinks it expedient, to direct the collector to admit goods to an entry, without an invoice, on an appraisement, taking bonds to produce the invoice and pay the duties. The act of 1st March, 1823, refers this subject to the judgment of the collector, but not in any case of non-production of the invoice as in the former law, but only "when no invoice has been received;" and the consignee makes oath of that fact. We thus see that the requisition of an invoice for an entry is positive and indispensable, as a general provision; but it may be dispensed with in a given case and under certain restrictions; that is, when no invoice has been received by the consignee, and he makes oath of that fact. He is then permitted to make the entry, without the invoice, as an indulgence to a presumed accident or mistake. This indulgence can be allowed only when the non-production of the invoice is owing to the fact that it has not been received, under the promise and expectation that it will afterwards be received and produced according to law. What, then, is to be the course of proceeding with goods of which the invoice has not been produced, nor accounted for in the manner mentioned, nor any promise or bond given for its production at a future day? Clearly, they are not to be admitted to an entry; they are not to be delivered to the consignee or importer, as in the other case, but they are to be deposited in the warehouse, to be disposed of in the manner already described. This is the only difference of treatment I can discover between the non-produc-

tion of an invoice because it has not been received, and its non-production because it does not exist, is not expected to be received, or is withheld for any cause or reason the importer or consignee may choose to act upon. If he will not produce the invoice, he will not be permitted to enter the goods, and they will remain subject to all the consequences and proceedings provided by the law in such cases.

It is my opinion, therefore, that if the invoice mentioned had been produced, it would not make out the case of the United States, however false it may be, and with whatever intent it was made up, as it is admitted by the District Attorney that he is unable to offer any proof that it, or any other invoice of the goods in question, was produced at the custom house for the purpose of making an entry.

The Jury found a verdict for the claimants.

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James Veacock

*v.*

Edward M'Call, Master of the Ship Atlantic.

1. Where the shipping articles specify the wages of the mate of a vessel, he cannot give parol evidence of an agreement to allow him other compensation.
2. Where the discharge of a seaman at a foreign port, before the termination of the voyage, is involuntary on his part, and without reasonable cause, he does not forfeit his wages, but is entitled to payment up to the time of the arrival of the vessel at the last port of delivery.

On the 26th April, 1831, the libellant signed a contract to perform a voyage from Philadelphia to Canton and back, as first mate on board the ship Atlantic, at the monthly wages of thirty-five dollars. On the same day the ship sailed, and arri-

ved again at Philadelphia on the 26th March, 1832. While they lay at Canton, a serious difference arose between the libellant and the respondent, which terminated in the discharge of the former, and he returned in another vessel to the United States, where he arrived on the same day with the Atlantic. On the 14th April, he brought the present suit, to recover the wages claimed to be due.

On the 14th June, 1832, the case came on to be heard before Judge HOPKINSON. It was argued by KITTERA for the libellant, and DUNLAP for the respondent.

In the answer the respondent had alleged that the libellant was discharged from the vessel at Canton, for good and sufficient cause; but on the hearing this allegation was withdrawn, and it was agreed that the discharge was to stand, as having been made against the consent of the libellant, and without good cause.

The libellant, in addition to the contract contained in the shipping articles for wages at the rate of thirty-five dollars a month, and which was not controverted by the respondent, offered parol testimony of an agreement by the respondent to allow him "three tons privilege in the vessel," which was valued at the sum of forty-five dollars a ton, amounting to one hundred and thirty-five dollars.

DUNLAP for the respondent.

This evidence is objected to. The articles contain the whole contract between the parties, and the attempt now made is to vary that contract. It is an endeavour to prove that the libellant is entitled to a higher compensation than that stated in the articles. They are the written and solemn evidence of the contract. They are, besides, specially required by the act of congress, under severe penalties. The object of the law is to prevent these verbal arrangements, and to ascertain in a solemn form, before the voyage begins, the rights and duties of all parties, owners, master, officers and seamen. The decisions of the courts of admiralty and common law have uniformly sustained this principle. 1 Story's Laws, 102. Abbot's Ship.

434. 441. Bartlett v. Wyman, 14 Johnson, 260. Johnson v. Dalton, 1 Cowen, 543. White v. Wilson, 2 Bos. & Pull. 116. The Isabella, 2 Robinson, 241. Elsworth v. Woolmore, 5 Espinasse, 84.

KITTERA, for the libellant.

The rule now adopted as to the admission of parol evidence, where there is a written contract, is that it shall not be received to contradict, but it may be to explain it, by showing what passed between the parties at the time it was made. It is not necessary that the contract of seamen should be in writing. One contract which he makes may be in writing, another may be by parol. This evidence does not relate to wages, but to compensation of a peculiar and additional nature; it is well settled that courts of admiralty will protect such agreements though not stated in the articles. Willard v. Dorr, 3 Mason, 161. The Minerva, 1 Haggard, 347. The George Home, 1 Haggard, 377.

Judge HOPKINSON rejected the evidence.

DECREE. That the libellant, JAMES VEACOCK, recover and have paid to him the sum of one hundred and ninety-five dollars, being the full amount of his wages for the whole voyage out and home, after deducting therefrom the moneys paid to him or to his order.

## DISTRICT COURT OF THE UNITED STATES.

### Eastern District of Pennsylvania.

NOVEMBER SESSIONS, 1832.

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THE UNITED STATES OF AMERICA

*v.*

THE SHIP LOUISA BARBARA.

1. To subject a vessel to forfeiture according to the provisions of the act of 2d March, 1819, there must be an excess of twenty passengers beyond the proportion of two to every five tons of the vessel.
2. In estimating the number of passengers in a vessel, no deduction is to be made for children or persons not paying, but those employed in navigating the vessel are not to be included.
3. In estimating the tonnage of a vessel, bringing passengers from a foreign country, the measurement of the custom house, in the port of the United States at which the vessel arrives, is to be taken.

THIS was a suit arising on an information filed by the Attorney of the United States, against the Dutch ship Louisa Barbara, as liable to forfeiture, for having on board more passengers than are allowed by the act of congress. The law of 2d March, 1819, declares, that if more than two passengers for every five tons of any vessel, according to custom house measurement, shall be brought into the United States, except the men employed in navigating the vessel, the master and owner shall each forfeit one hundred and fifty dollars for every passenger above that number; and if such excess amounts to twenty passengers in the whole, the vessel shall be forfeited.

It appeared in evidence, on the part of the United States, that the Louisa Barbara arrived in the port of Philadelphia on the

8th August, 1832; that the captain presented at the custom house a report or manifest of all his passengers, amounting, exclusive of the men employed in navigating the vessel, to one hundred and seventy-eight; and that on a measurement of the vessel by the custom house officers, she was found to measure three hundred and ninety-three tons and eighty-two ninety-fifths of a ton, which would allow her to bring one hundred and fifty-seven passengers, twenty-one less than the number actually on board. On these facts the District Attorney contended that the vessel ought to be condemned.

It was proved by the claimants, that of the one hundred and seventy-eight passengers reported, twelve were in the cabin, nine only of whom paid, and that of the remainder, upwards of forty were children under twelve years of age, and not paying passage money, and that they were well accommodated, and arrived in good health; that the measurement of the vessel by the Dutch mode was two hundred and eighteen lasts, and that the last was to be taken as two tons, thus making the tonnage by the Dutch rule four hundred and thirty-six tons, and allowing one hundred and seventy-four passengers. On these facts the counsel of the claimants contended that the passengers, such as the act of congress meant, were not in a greater proportion than it allowed; that the spirit of the law was not violated, as they suffered no inconvenience; and that in fact, according to the foreign measurement, which ought to be adopted, the tonnage of the vessel was so great as not to render her liable to forfeiture.

The case was argued by Gilpin, District Attorney, for the United States, and by J. S. Smith for the claimants.

On the 21st January, 1833, Judge Hopkinson delivered the following opinion:

The information in this case is founded on an act of congress passed on the 2d March, 1819, for "regulating passenger ships and vessels."

The first section of this law enacts that if the master, or other

person on board of any ship or vessel, shall take on board of such ship or vessel, at any foreign port or place, or shall bring or convey into the United States from any foreign port or place, a greater number of passengers than two for every five tons of such ship or vessel, according to the custom house measurement, the master and owner of such vessel shall severally forfeit and pay to the United States the sum of one hundred and fifty dollars for each and every passenger so taken on board, over and above the said number of two to every five tons: "Provided, that nothing in this act shall be taken to apply to the complement of men usually and ordinarily employed in navigating such ship or vessel."

The second section of the act enacts "that if the number of passengers, so taken on board of such ship or vessel, or conveyed or brought into the United States, shall exceed the said proportion of two to every five tons of such vessel, by the number of twenty passengers, in the whole, every such vessel shall be deemed and taken to be forfeited to the United States."

The information on trial is founded on this second section of the act, and claims a forfeiture of the ship on an alleged violation of its provisions.

There is no contrariety of evidence about the facts of this case. The ship Louisa Barbara arrived at the port of Philadelphia on the 8th August last, having on board one hundred and seventy-eight persons, taken on board at Amsterdam and brought to the United States, not being any part of the complement of men employed in navigating the ship. On a measurement of the ship by the proper officers of the custom house, she was found to contain three hundred and ninety-three tons and eighty-two ninety-fifths of a ton, custom house measurement of the United States, according to the sixty-fourth section of the act of congress of 2d March, 1799, directing the mode of measuring a ship or vessel to ascertain her tonnage. This tonnage would allow the ship to bring to the United States but one hundred and fifty-seven passengers, at the rate or proportion of two to every five tons; and of course, if the one hundred and seventy-

eight persons on board are to be deemed passengers within the meaning of the law, there was an excess of twenty-one; and as an excess of twenty is sufficient to incur the penalty of forfeiture of the ship, she has become liable to it.

The defence has been mainly rested on the fact, that a large proportion of the one hundred and seventy-eight persons taken on board, were children, who paid nothing for their passage, and cannot, therefore, be considered or taken to be passengers within the intention of the law. The captain has testified that there were twelve persons in the cabin, of whom but nine paid their passage: that there were in the steerage, or between decks, one hundred and sixty-six, of whom but one hundred and twenty-seven paid their passage: that of the children on board, twenty-five were under five years of age; twenty-one from five to ten; fourteen from ten to fifteen; and seventeen from fifteen to twenty: that no passage was paid for those under twelve years of age, nor for those of twelve.

An argument, not wanting in plausibility, was urged to show that children, especially those of a very tender age, are not within the object or evil to be prevented by the law, and therefore cannot be taken to be a part of the number of passengers allowed by the law. It was indeed contended that a passenger, commercially and philologically speaking, is only one who pays for his passage, and therefore that none of the persons in this ship who did not pay for their carrying, ought to be taken into the count of the number of passengers on board of this ship, within the meaning of the law.

If we were to make these deductions of children and unpaid persons on board of a vessel from the number of her passengers, we should find no warrant for it, in the law, and throw the construction of the act into such uncertainty as would render it little better than a nugatory attempt at legislation. In regard to children, we should be obliged to fix the age at which they may not be considered as passengers within the act, and the question of payment would often be as difficult to settle. The inconvenience and danger to health and life from crowded

vessels, are the same whether the persons on board pay or do not pay for their passages, and although it may not be probable that the owners of vessels will bring passengers for nothing, yet the law may be evaded and defeated by secret artifices and agreements on the subject of compensation for the passage, if it is to be understood that paying passengers only are within the law. The payment would thus become a part of the case of the prosecution; and legal proof would be required of it. The only exception or limitation, given by the act of congress, is found in the provision which declares that it shall not apply to the complement of men employed to navigate the ship. The phrase is, "shall exceed, by the number of twenty passengers in the whole;" by which I understand that all persons on board are to be counted; that no exceptions are allowed; but that if, on the whole, that is, all taken, they exceed the limited number, the penalty attaches. The ship's crew are expressly excepted, but no other persons on board.

Another effort was made to withdraw this ship from the penalties of the act. It was said that if her tonnage is estimated according to the Dutch mode of measurement, the number of passengers on board would not exceed two to every five tons, and the requisitions of the act have been strictly complied with. There is considerable uncertainty about the fact here assumed; but the argument founded on it is altogether inadmissible. It is this, that although the act of congress refers, for the tonnage of the ship, 'to custom house measurement,' it does not specify what custom house measurement is intended; it does not say 'of the United States.' It is impossible to imagine, that in the regulation of vessels coming into our own ports, to be entered at our own custom houses, to be there examined and inspected by our own officers, to ascertain whether they have conformed to our own laws, any measurement could be referred to but our own. What did congress know? What can the courts of the United States know, of any other measurement of the tonnage of a vessel than that prescribed by our own laws? If we leave this guide, we shall have a differ-

ent rule for every vessel that comes into our ports, according to the various modes of measurement that may be used by the various nations of the world. The argument, too, would be absolutely destructive of the law; for if the measurement of the United States is not to be adopted in the construction of this law, because it is not expressly designated, the same reason will exclude every other measurement as no one is named.

Although the excess, in this case, above the number, which incurs a forfeiture of the vessel, is small, the excess over the number allowed by the law is considerable. Whether the circumstance of there being so many children has misled the owners and captain of the ship, I cannot take into my consideration of the case. It may be a proper question to be entertained by that department of our government, which administers its liberality and mercy, and may forbear to execute the rigour of the law, where it is believed that its violation has been innocent or excusable. There is no such power here.

Decree. That the Ship Louisa Barbara, named in the information, be condemned and forfeited to the United States, according to the prayer of the information.

## DISTRICT COURT OF THE UNITED STATES.

### Eastern District of Pennsylvania.

FEBRUARY SESSIONS, 1833.

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THE UNITED STATES OF AMERICA

*v.*

A PACKAGE OF LACE IMPORTED IN THE SHIP MONONGAHELA.

1. To justify the forfeiture of a package of goods, under the provisions of the fourth section of the act of 28th May, 1830, either the package must contain an article not described in the invoice, or the package or invoice must be made up with intent to evade or defraud the revenue.
2. On an information for forfeiture of a package of goods, containing an article not described in the invoice, under the provisions of the act of 28th May, 1830, neither accident, mistake, nor innocence of fraudulent intention is a sufficient ground of defence.
3. The proviso in the sixty-seventh section of the act of 2d March, 1799, which declares "that a package differing in its contents from the entry shall not be forfeited, if it shall be made to appear to the satisfaction of the collector or of the court of the district that such difference proceeded from accident or mistake," is repealed by the act of 20th April, 1818, and the forfeiture can only be remitted in the manner prescribed by the act of 3d March, 1797.

ON the 5th September, 1831, the attorney of the United States, for the Eastern District of Pennsylvania, filed an information against a package of cotton lace, imported into the port of Philadelphia, on the 24th July, 1831, from Liverpool, in England, on board of the ship Monongahela. The information alleged that the said goods were subject to ad valorem duty, and that the package, being inspected, was found to con-

tain certain goods, wares, and merchandise, not described in the invoice, whereby the same was forfeited; and due process of law for the condemnation of the goods in question was prayed for.

On the 1st July, 1831, Eliza Bacon filed a claim to the said package, for and on behalf of Charles Mellor. In answer to the information, the claimant denied that the package was made up with any intent to evade and defraud the revenue, or that the same was liable to forfeiture.

On the 19th February, 1833, the case came on for trial before Judge HOPKINSON, and a special jury.

It appeared by the evidence, that, on the 10th August, 1831, the goods were entered at the custom house by the claimant, who produced the original invoice at the time of making the entry. On the same day, and immediately after the entry, the package in question was brought to the custom house, in order to be inspected, under the provisions of the fourth section of the act of 28th May, 1830. On opening the package, at the public warehouse, thirteen pieces of quillings were found lying on the top, which were not mentioned or described in the invoice. Testimony, taken under a commission to Nottingham, in England, where the lace was manufactured, went to show, that the thirteen pieces of quillings had been placed in the package by accident and mistake, and that the omission to describe them in the invoice arose from ignorance, on the part of the person by whom it was made, that they were contained in the package.

The case was argued by GILPIN, District Attorney, for the United States, and BROOM for the claimant.

GILPIN, for the United States.

This information is founded on the fourth section of the act of 28th May, 1830, relative to goods subject to ad valorem duty, which declares, "that if any package shall be found to contain any article not described in the invoice, the same shall be forfeited." The provisions of this law are too plain to be controverted. Its object is to secure, even more strictly than before, the correctness of the invoice. It requires that docu-

ment to be correct, under the heaviest penalty. By the act of 2d March, 1799, a discretion was confided to the collector of the customs, to judge whether or not a difference between the contents of the package, and the account of them given at the time of entry, was the result of accident or design; but that discretion no longer exists. Repeated evasions of the revenue have given rise to this change. If the error is not fraudulent, the secretary of the treasury is authorised to remit the forfeiture, by the act of 3d March, 1797. 1 Story's Laws, 458. 632. 3 Story's Laws, 1684.

Broom, for the claimant.

It is a mistake to suppose that the law does not look to the fraudulent intention. Without that there can be no forfeiture. None has been proved in this case, none even is alleged in the information or on the argument. The whole series of the revenue laws shows that the forfeiture depends on the fraudulent design. The only change has been in the tribunal which is to judge of this design; formerly it was the collector of the customs, now it is the court and jury. The act of 2d March, 1799, expressly exempts a package from forfeiture, though containing an article not described in the invoice, if the collector is satisfied there was no intention to defraud the revenue. The act of 20th April, 1818, repeals certain parts of that law, but does not touch this proviso. It could not be intended to apply the remedy prescribed in the act of 3d March, 1797, to these cases, for it was passed previously to the law of 2d March, 1799, which legislates upon these matters, and to which alone, and not to that of 3d March, 1797, the provisions of the act of 20th April, 1818, are supplementary. This is the more evident, because this latter law directs that "forfeitures are to be recovered and distributed in the manner prescribed by the act of 2d March, 1799," and surely it does not mean that the forfeitures are to be recovered and distributed under one law, and remitted or mitigated under another.

Gilpin, for the United States, in reply.

Nothing can be more explicit than the fourth section of the act of 28th May, 1830; if it conflicts with any previous law,

it repeals it. Where a subsequent statute is inconsistent with a former one and the two cannot be reconciled; or where the latter is on the same subject matter and introduces some new qualifications or modifications, the two cannot stand together; the latest must prevail. Affirmations in statutes that introduce new provisions, imply a negative of all that is not within their purview; so that a law directing a thing to be done in a certain manner, implies that it shall not be done in any other manner. United States v. Hair Pencils, 1 Paine, 400.

But in fact there is no conflict between the act of 28th May, 1830, and that of 2d March, 1799. The designation of the offence is the same in both; the penalty is the same; the mode of recovery is the same. The difference is in the time and manner of redress, mitigation, or pardon after the offence has been proceeded against and ascertained. To establish, therefore, the discordance now suggested, and to show that the subsequent and late law is to be controlled by that passed twenty-five years since, would not, even if it could be done, afford a valid ground of defence.

Judge Hopkinson delivered the following charge to the jury:

The information you are trying is founded on the fourth section of an act of congress passed on the 28th May, 1830. This section, after directing the manner in which the collectors of the customs shall cause the packages of imported goods to be opened and examined, goes on to enact that "if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension, or otherwise, to evade and defraud the revenue, the same shall be forfeited."

Two distinct acts are made the grounds or causes of forfeiture. 1. If a package contains any article not described in the invoice. 2. If the package or invoice has been made up with intent to evade or defraud the revenue.

The information before you proceeds on the first, and charges that the package or box in question did contain certain articles

not described in the invoice. This is the fact alleged in the information, and it is denied by the answer, and is thus put before you for your decision upon it. It is a question of fact merely, apart from every consideration of intention, innocent or fraudulent. Did this package contain any article not described in the invoice, or did it not? Your verdict is to answer this question. The inquiry on the second ground of forfeiture is more difficult and complicated, for in that case the jury have to decide, not only upon the truth of the fact charged, but also the intention with which the act was done, whether in innocence, by mistake, or by accident, or with a design to defraud the revenue.

In this case there is no dispute about the fact; it is not, and it could not be denied, that the box of laces did contain articles not described in the invoice. The whole defence is put on the law of the case, which relieves you from the trouble and responsibility of deciding it. It is a question which belongs to the court, and I shall take it upon myself on my own responsibility.

The defence is, that, although the fourth section of the act of 28th May, 1830, declares that a forfeiture shall be incurred, if the package contain any article not described in the invoice, yet that no such forfeiture is incurred unless the articles so found in the package were put there with a fraudulent intent; that if it happened by accident or mistake, it may be inquired into on this trial; that this is to be decided by you; and that the claimant will be entitled to your verdict if you shall be of that opinion. Is this the true meaning and construction of the law? In such a question we must first look to the law itself. Is that clear and explicit? Has it no ambiguity, which requires that we should look further for an explanation? I can see no such ambiguity in the enactment in question. It is a direct, explicit declaration, that if any article shall be found in a package which was not inserted or described in the invoice of that package, the same, that is, the package, shall be forfeited; not a word or intimation about the intention with which the surplus articles were put

into the package; not a suggestion that accident or mistake is to be a defence on the trial of a prosecution for this penalty, or is to be any part of the issue or inquiry on such trial.

The argument of the counsel for the claimant has taken another course to bring him to his conclusion. His main reliance has been on the sixty-seventh section of the act of 2d March, 1799, which he considers now to be in force, and to be incorporated with the provisions of the law of 1830. The section of the former act referred to, is in many respects different in its course of proceeding from the latter act; changes having been made from time to time as experience pointed them out. The sixty-seventh section of the act of 1799, made it lawful for the collector, after entry of any goods, on suspicion of fraud, to open and examine any package; and "if the package so examined shall be found to differ in its contents from the entry, then the goods contained in such package shall be forfeited." Here we see, that the examination is to be made after the entry; that it is to be made only on a suspicion of fraud; and the difference which works the forfeiture, is to be between the entry and the contents of the package. Nothing is said about the invoice. By the act of 1830, the collector is directed absolutely, and whether he has or has not a suspicion of fraud, to cause one package out of every twenty of each invoice, to be opened and examined; and if the package thus examined shall be found not to correspond with the invoice, then all the goods contained in the entry are to be inspected; and then it is declared, that if any package shall be found to contain an article not described in the invoice, it shall be forfeited. By the law of 1799, the collector is authorised to open and examine packages only on a suspicion of fraud: this is the groundwork of his proceeding; and the subsequent proviso of the law is consistent with the principle of the enactment; it is, that the forfeiture shall not be incurred if it shall be made to appear to the satisfaction of the collector, or of the court in which a prosecution shall be had for the forfeiture, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. The opening

and examination of the package is to be made only when, in the judgment and discretion of the collector, there is good reason to suspect fraud; and it is consistent with this principle, that if he shall afterwards be satisfied that his suspicions were unfounded, and there was no intention to defraud the revenue, he should have the authority to declare this opinion, upon which the forfeiture should not be incurred.

Now the argument for the present claimant is, that the proviso of the sixty-seventh section of the act of 1799 is still in force, although it is clear that the enacting clause has been suspended by subsequent laws; and that, therefore, if on a seizure under the law of 1830, the collector should be satisfied there was no intention of fraud when goods, not described in the invoice, are found in a package, the forfeiture would not be incurred; that the court has the same power; and that the jury stands in the place of the court in the exercise of this power, since it has been decided that seizures on land are to be tried by a jury. This process of reasoning, which is not a little complicated, would bring the question of intention before you in the determination of this cause. It is alleged that this proviso has never been repealed, and this is the foundation of the argument.

The act of 1799 continued to be the law of the land until 1818, when a supplement to it was passed, introducing material changes in the whole revenue system. By the twenty-second section of the supplement, a change is made in the law on the subject of our present inquiry. The collectors are directed, without any previous suspicion of fraud, to cause at least one package out of every invoice to be opened and examined. We stop here to ask, if this positive order does not take from the collector the discretion to examine a package or not, according as he should or should not entertain a suspicion of fraud; and could he justify himself for neglecting to do it by the allegation that he had no such suspicion? Yet there is no express repeal of that part of the sixty-seventh section of the act of 1799, any more than of the proviso of that section.

We proceed with the act of 1818. After directing that the package shall be examined, it enacts, that if it shall be found not to correspond with the invoice, then a full inspection shall be made of all the goods included in the entry; "and if any package is found to contain any article not described in the invoice, the whole package shall be forfeited." It is further directed, that "if the goods shall be subject to an ad valorem duty, the same proceedings shall be had, and the same penalties shall be incurred as are provided in the eleventh section of the act: provided, that nothing therein contained shall save from forfeiture any package having in it any article not described in the invoice." We are here referred to the eleventh section of the act, and by that it is enacted that when, in the opinion of the collector, there is just ground to suspect that goods, subject to an ad valorem duty, have been invoiced below their true value, he shall direct them to be appraised; and if the appraised value shall exceed the invoice price, an addition is to be made to it, on which the duties are to be estimated. To prevent any misunderstanding, to preserve the distinction between goods found in the package not mentioned in the invoice, and an undervaluation of them in the invoice, it is expressly provided that nothing in the act shall save from forfeiture any package having in it goods not described in the invoice.

The whole clause or provision in the act of 1799, which relieves the forfeiture, if the collector or the court shall be of opinion that no fraud was intended, is omitted. Do we find no substitute for it; no power to discriminate between fraudulent and innocent cases of excess? There is a substitute. The power to discriminate between such cases remains, although it is vested in another tribunal. The twenty-fifth section enacts, that all penalties and forfeitures incurred by force of this act may be mitigated or remitted, in the manner prescribed by the act entitled, "An act for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned," passed on the third day of March, 1797. That act directs the party who has incurred the penalty or for-

feiture, to present his petition to the judge of the district, who is to inquire into the circumstances of the case; to state the facts and transmit them to the secretary of the treasury, who shall have power to mitigate or remit the forfeiture, if, in his opinion the same shall have been incurred without wilful negligence, or any intention of fraud. It is to be observed that there never was a power, in the collector or the court, to remit a forfeiture. The provision of the law of 1799, was that no forfeiture should be incurred in the case mentioned, if the collector should be of opinion that the difference, between the entry and the contents of the package, proceeded from accident or mistake, and not from an intention to defraud the revenue. The law of 1818, also enacts a forfeiture for such a difference, but does not re-enact the condition on which the forfeiture shall not be incurred. The forfeiture is declared to be absolute and complete, on finding any article in the package not described in the invoice, and the circumstance of accident or mistake which, in the former law, was referred to the judgment of the collector, and would relieve from the forfeiture, is, by the act of 1818, to be the ground of a petition for a remission, to be judged of by the secretary of the treasury. How can we suppose that it was the intention of congress, that there should be no forfeiture in cases of accident or mistake, and, at the same time, to refer such cases to the treasury for a remission of the forfeiture at the discretion of the secretary? Yet such must be the state of the law, if the proviso of the sixty-seventh section of the act of 1799 is considered to be in force. The whole of that section is supplied by the act of 1818, and repealed so far as it is inconsistent with it.

Some stress was laid on that part of the twenty-fifth section of the act of 1818, which declares, that all the penalties and forfeitures incurred by force of it, "shall be sued for, recovered, distributed, and accounted for, in the manner prescribed," by the act of 2d March, 1799. It has been argued that this has reference to and keeps alive the sixty-seventh section of that act. I see no reason for this construction. The section

of the law of 1799 referred to, is evidently the eighty-ninth, which provides expressly for the recovery and distribution of the penalties incurred by any breach of it.

The next act on the subject is that of 1st March, 1823, another supplement to the law of 1799. The fifteenth section of this act, among other things, enacts, that "if any package be found to contain any article not described in the invoice, the whole package shall be forfeited;" there is then this proviso; "that the secretary of the treasury be, and he is hereby, authorised to remit the forfeiture, if in his opinion, the said article was put in by mistake, or without any intention to defraud the revenue." Here then is the whole case provided for; what shall constitute the offence; what the penalty or punishment shall be; and in what manner and by what authority, a discrimination shall be made between cases of fraud and cases of mistake. It is hardly possible to believe that the same power was left in the collector under the law of 1799. The recovery and distribution of penalties and forfeitures are to be made according to the act of 2d March, 1799, and to be mitigated or remitted in the manner prescribed by the act of 3d March, 1797, already referred to.

We now come to the law of 1830, under which this prosecution has been instituted. It is entitled, an "act for the more effectual collection of the impost duties." I have already remarked upon the language of the section, which embraces the charge laid in this information. There is nothing doubtful or ambiguous in it, and I have found nothing in any antecedent law to affect the construction of this act, in the manner or to the purpose contended for by the claimant. The seventh section of this act also refers it to the secretary of the treasury to remit any forfeiture, whenever he is of opinion that no fraud on the revenue was intended.

On the whole case, then, the fact being admitted or proved to your satisfaction, that the box or package of laces in question, did contain articles not described in the invoice, I have no doubt on the law, that the whole package is forfeited, and that

neither you nor I have any thing to do with the question, whether these articles got into the box by mistake or accident, nor with the intention, fraudulent or innocent, in putting them in. The law has given the decision of that question to another power in the government. It belongs not to you or to me.

The JURY found a verdict for the United States.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

MAY SESSIONS, 1833.

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THE UNITED STATES OF AMERICA

*v.*

A PACKAGE CONTAINING TWO HUNDRED AND FIFTY POUNDS OF CONEY WOOL AND FIVE DOZEN AND TEN CAPS, IMPORTED IN THE SHIP ANN.

1. On an information for forfeiture of a package of goods, containing an article not described in the invoice, under the provisions of the act of 28th May, 1830, evidence of accident or mistake may be given, to rebut the inference of fraudulent intention, but is not a sufficient ground of defence.
2. Where an article not described in the invoice is found in a package, the whole package, and not the article alone, is forfeited under the provisions of the act of 28th May, 1830.

ON the 16th October, 1830, the attorney of the United States for the Eastern District of Pennsylvania, filed an information against a package containing two hundred and fifty pounds of coney wool and five dozen and ten caps, imported into the port of Philadelphia on the 8th September, 1830, from Liverpool, in the ship Ann. The information alleged that the goods were subject to ad valorem duty, and that the package being inspected was found to contain certain goods, wares, and merchandise not described in the invoice, whereby the same was forfeited; and due process of law, for the condemnation of the goods in question, was prayed for.

On the 26th November, 1833, Daniel Vail and Peter Marseilles filed a claim to the package. In answer to the information the claimants averred, that if the package did contain articles not described in the invoice, the same occurred wholly by accident and mistake, and without any intention to defraud the United States, and they alleged that it was not liable to forfeiture.

To this answer a general replication was filed on the part of the United States.

On the 27th May, 1833, the case came on for trial before Judge HOPKINSON and a special jury. It was argued by GILPIN, District Attorney, for the United States, and CHAUNCEY for the claimants.

On the part of the United States the original invoice, presented at the custom house by the claimants at the time of entry, was produced. It described the package in question as containing only two hundred and fifty pounds of coney wool. It was proved that on opening it at the public stores five dozen and ten caps were found within. The counsel for the claimants then offered to read testimony, taken under a commission to London, in order to prove that the articles thus omitted in the invoice, were put into the box by accident or mistake.

On admitting this evidence, Judge HOPKINSON delivered the following opinion:

The question of law in this case has been fully argued and considered, in another case, by this court. It is my opinion, that the only fact we have to try here, is whether the package contained articles not described in the invoice. We have nothing to do with the intention, with which they were so put in the box, nor whether it was done by mistake and accident, or with a fraudulent design upon the revenue. This is an inquiry for the secretary of the treasury to make, should the case be brought under his consideration, in the manner directed by the act of congress, and not for this court and jury to pass upon. In strictness, therefore, the evidence now offered should

be rejected as having no relevancy to the issue; but, as the claimants are said to be respectable merchants, it may be due to them, or at least, no unreasonable indulgence, to allow them to show their case to the jury and the public, as it really is. I shall, therefore, permit the testimony to be read for the reason given, and not for any influence it can legally have on the verdict.

This evidence being read, and no other offered on the part of the United States, Judge HOPKINSON delivered the following charge to the jury:

It is the opinion of the court that, by the revenue laws, if any package, imported into the United States, shall be found to contain any articles not described in the invoice, the whole package shall be forfeited; and that this forfeiture cannot be avoided, by showing that the articles omitted in the invoice were put into the package by accident or mistake, and without any intention to defraud the United States. The power to remit the forfeiture, in cases of accident or innocent mistake, without a fraudulent intention, is given to the secretary of the treasury, and not to the court and jury by whom the issue on the information is tried.

The JURY found a verdict for the United States.

## The United States of America
## v.
## John Halberstadt.

S.C. 15 Mag. Pa. Rep. 314

**The provisions of the act of 2d March, 1799, making it penal to sell, alienate or remove an empty cask, which had contained foreign distilled spirits, before the marks set thereon have been defaced, refer to a sale, alienation or removal by the owner to a purchaser or alienee, and not to a removal by the person who receives it after a purchase.**

This was a second suit, brought by the attorney of the United States for the Eastern District of Pennsylvania, on the representation of the collector of the customs, against the defendant, to recover the penalty of one hundred dollars accruing on the purchase or removal of an empty cask, which had contained foreign distilled spirits, before the marks set thereon by the officers of the customs had been defaced.

By the forty-fourth section of the act of 2d March, 1799, regulating the collection of duties on imports and tonnage, it is provided, that on the sale of any empty cask, which has been branded or marked by the officers of inspection, as containing distilled spirits, prior to the delivery of it to the purchaser or any removal of it, the marks so set thereon are to be defaced in the presence of an officer of inspection or of the customs; and "every person who shall sell or in any way alienate or remove any cask, which has been emptied of its contents, before the marks and numbers set thereon shall have been defaced and obliterated in the presence of an officer of inspection, shall for every such offence, forfeit and pay one hundred dollars, with costs of suit."

On the 29th May, 1833, the case came on to be tried before Judge Hopkinson and a special jury. The facts of the purchase of the empty casks, and of their being removed to the warehouse of the defendant, without the marks being defaced, were

admitted as on the former trial, and similar evidence was given to show that the purchase of the casks was made by a clerk of the defendant, but that he had not given any directions in regard to the particular kind of casks, and knew not that the marks were yet upon them, until notice of the fact was given to him by the officers of the customs, by whom they were found at his store. On the part of the United States additional evidence was produced, to show that the defendant had directed and acquiesced in the act of his agent.

The case was argued by GILPIN, District Attorney, for the United States, and CHEW, for the defendant.

Judge HOPKINSON informed the counsel that he did not expect to hear any of the points of law decided on the former trial (ante, page 267) again argued. That, while either party might have the benefit of excepting, he should charge the jury as he had done before. 1. That if in their opinion the defendant had no agency in, or knowledge of the purchase and removal of the casks, nor any acquiescence in the illegal proceedings by his agent, although he might be the owner, in whole or in part, of the casks, he was not liable to the penalties of the act; but the punishment should be visited on the offender, or the person who actually sold or removed the casks in violation of the law. 2. That the provisions of the forty-fourth section of the act of 2d March, 1799, are in full force and not repealed by the act of 20th April, 1818, providing for the deposit of wines and distilled spirits in the public warehouses.

GILPIN, for the United States.

The decision of the court made on the former trial, in regard to the points of law involved, leaves this principally a question of fact for the jury. The evidence on the part of the United States is materially changed, and is now clearly sufficient to show that the defendant was the principal person in the whole transaction; that he not only directed his clerk to make these purchases, but that he recognised his acts after he had done so. If so, this will afford just ground for the jury to find that the defendant did remove the casks, described in the declaration,

without having the marks erased therefrom, which is the offence by which the penalty is incurred.

CHEW, for the defendant.

It is not admitted that the testimony in this case establishes a participation of the defendant in any illegal acts of his clerk; on the contrary, the weight of evidence on this, as on the former trial, is against any such participation. The decision of the court on that occasion has settled the law conclusively as to this case.

There is, however, another ground not taken on the former trial. The act of congress refers exclusively to the seller and not to the purchaser of the cask; it was impossible for any but the seller to have any of these marks obliterated; it was his duty. The law is the same with the certificates as with the marks; and it has been decided that certificates must be surrendered on the sale of the casks by the seller. 1 Story's Laws, 611, 612. Peisch v. Ware, 4 Cranch, 347. Sixty Pipes of Brandy, 10 Wheaton, 421. United States v. Chests of Tea, 12 Wheaton, 486.

GILPIN, for the United States, in reply.

The removal meant by the act of congress refers to both seller and purchaser. This is evident by the express words of the law. The law states removal as well as alienation. If the seller is only meant, why say more than delivery? The seller can do no more; yet the law says on removal. The act of the seller is complete on alienation and delivery, a removal is for the purchaser. If the penalty only attached to the seller, why not limit the provision of the law to alienation and delivery? This is also shown by an examination of the other parts of the law. The law intends to have certain marks for its use; to have them at certain times, to abolish them at others; all who violate this are punishable. Every person having a cask which is full must have a certificate and the marks upon it, whether he be a purchaser or the original importer. So every person having a cask which is empty, must have the marks erased. In other sections of the law we find wrong removals punished, as in the case of any person concerned in removing goods not having a

permit, or not weighed; so, by this law any person removing casks, not as the law requires them, is to be punished in the manner provided. The buyer is bound and is able to know it is wrong, as well as the seller; he is not an innocent sufferer; he can use these casks, he can carry them abroad and refill them. If any person may buy and remove, there is an end to preventing fraud on revenue. Where a party has it in his own power to avoid a penalty and does not do it, it is incurred. Here the buyer could and ought to avoid it, and he does not. 1 Story's Laws, 617. United States v. Chests of Tea, 1 Paine, 499.

Judge HOPKINSON delivered the following charge to the jury:

On a careful review of the law, a question has presented itself, which did not occur at the former trial; nor was it suggested on that trial, by the counsel on either side. It is this. Do not the directions of the law apply only to the seller of a cask? Is not he the person on whom it is enjoined to erase the custom house marks, on the sale of any cask, before the delivery thereof to the purchaser, or before any removal thereof?

Do these directions apply to the purchaser of the cask, or only to the seller? How can the purchaser deface the marks prior to the delivery of them to him, or before they are removed from the possession of the seller? How can he exercise any act of ownership over them until they are delivered to him; or before they are removed from the place where they were in the possession of the seller? It seems to me that the provisions and penalties of the law apply only to the person who sells a cask, without defacing the marks; not to the purchaser of such casks, who may not be presumed to know any thing of their antecedent history, where they came from, or what was in them.

But I go on the words of the law. They are as follows: "Every person who shall sell, or in any way alienate or remove any cask, chest, vessel or case, which has been emptied of its contents, before the marks and numbers, set thereon pursuant to the provisions aforesaid, shall have been defaced or obliterated

in presence of an officer of inspection; or who shall neglect or refuse to deliver the certificate issued to accompany the cask, chest, vessel, or case of which the marks and numbers shall have been defaced and obliterated in manner aforesaid, on being thereto required by an officer of inspection or of the customs, shall, for each and every such offence, forfeit and pay one hundred dollars with costs of suit."

If the purchaser is liable, he is so the moment the cask is removed; even before it comes to his store, or actual possession, or he can know whether it has, or has not, or ever had, any marks upon it, or that they had been defaced. A man sends an order from the country for empty casks; they are sent without defacing the marks; the penalty under such a construction is irrevocably fixed upon him. It is now impossible to comply with the law; the marks cannot be defaced before delivery or removal.

The Jury found the following verdict:

"We find the facts proven, that the defendant did remove the cask described in the declaration, without having the marks erased therefrom, and having purchased the same from some person unknown to the jury."

On this verdict the court subsequently directed judgment to be entered for the defendant.

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## The United States of America
*v.*
## Ellen Duval, Administratrix, and William Duval, Administrator of Edward W. Duval, Deceased.

1. A usage, which is to govern a question of right between parties, must be so certain, uniform, and notorious, as to be understood and known by them.

2. The usage of a department of the government, in settling its accounts, can have no effect on those of an individual unless it is certain, uniform and notorious.
3. Although the salary of an Indian agent is fixed under the provisions of the act of 20th April, 1818, at a certain sum, yet he has a right to an allowance in addition, for such services or expenditures as are authorised by a general usage of the Department of War.
4. Where a charge, not prohibited by law, is supported by a clear equity arising from a bonâ fide performance of service by a public officer, or a bonâ fide expenditure of money for the public service, a discretion is properly vested in the head of a department of the government to allow it, although there is no express authority for it, and it is not a subject of strict legal right.
5. In all cases where a discretion is confided to the head of a department of the government, to allow or disallow a charge of a public officer, a court and jury have the same discretion over the charge, when it comes before them for revision and examination.
6. Where a public officer, at the request of the head of a department, performs other public duties than those properly belonging to his office, he is entitled to extra compensation.
7. Expenditures made by an Indian agent, for the benefit of the Indians, and on a tract of land reserved and held by themselves, are not to be charged to the United States.
8. Under the provisions of the act of 3d March, 1797, no claim of a public officer for a credit, can be admitted on a trial, unless it has been presented to and disallowed by the accounting officers of the treasury.
9. A suspension of a claim for a credit, by the accounting officers of the treasury, is not a disallowance, although no particular form of allowance or disallowance is required.
10. Where a controversy consists chiefly of questions of fact, the objections to a verdict must be very cogent to induce the court to grant a new trial.
11. Where a jury render a verdict against the plain principles of law, as laid down by the court, and against clear and unquestioned evidence, the court will grant a new trial notwithstanding the particular circumstances or general justice of the case.

On the 25th January, 1833, suit was brought in this court by the United States against the representatives of Edward W. Duval, to recover eleven thousand five hundred and thirty-eight dollars and fifty-four cents, for that sum of money alleged to have been received by him in his life time, and to be still due and unpaid. To this suit the defendants pleaded the general issue. The case came to be tried before Judge Hor-

KINSON and a special jury, on the 3d June, 1833, when the material facts established were as follows.

On the 7th October, 1824, Mr. Duval was appointed "Indian Agent to the Cherokees on the Arkansas," and gave bond to the United States with two sureties, in the sum of ten thousand dollars, for the faithful discharge of the duties of the office. There being no agency house, he was authorised to build one at an expense not exceeding two thousand dollars. Finding, however, on his arrival there, that the other duties of his station prevented his attention to this object, and having a house of his own, such part of it as was necessary was occupied for the public use, and a rent of one hundred and twenty dollars per annum, allowed by the government. In 1826, however, it being considered absolutely necessary, he was directed to purchase a house at the cost first specified. This he did on the 31st March, 1827, but the building requiring much alteration and repair, was not completed till the end of December, 1829, though partially occupied in June preceding; the entire cost of purchase, alterations, and repairs having amounted to two thousand six hundred and seventy-nine dollars and sixty cents. Mr. Duval was also directed to build, for the use of the Indians, a cotton gin, but limited to seven hundred dollars; the Indians themselves wishing a better one, offered him five hundred dollars more from their own funds, and ultimately agreed, should it cost above twelve hundred dollars, to supply the excess; it was finished in 1829, for eighteen hundred and seventy dollars and ninety-four cents. Immediately after his appointment, and with these instructions as well as others in regard to the general discharge of his duties as agent, Mr. Duval went to Arkansas. He remained there until January, 1828, acting to the entire satisfaction of the government, and obtaining much influence among the Indian tribes. He devoted himself especially to carry through the plan of removing the Indians over the Mississippi, and was entrusted with large disbursements for that object.

His accounts appear to have been regularly rendered up to this time.

In the winter of 1827, the Cherokees, urged on as they represented by the pressure of heavy grievances, determined to send a delegation to Washington, without the usual previous permission to do so, and with some difficulty prevailed on Mr. Duval to accompany it, on the 3d January, 1828. This visit led to negotiations of importance, in which he acted as the principal negotiator for the government. They ended in a treaty with the Cherokees, on the 6th May, 1828, for the cession of their territory lying within the boundaries of Arkansas, and removal beyond its western limits. By the fourth article, however, a small tract, on which various improvements had been made, was reserved from the general cession, and agreed to be sold by the United States, who were specially to apply the proceeds to erect a mill and other works, for the benefit of the Cherokees, in their new country. On the 6th of June the delegation left Washington to return home.

Mr. Duval remained until the month of November following, up to which time he settled his accounts. He then returned to Arkansas, entrusted with carrying into effect the treaty made in the spring; and was also appointed agent for the Choctaws west of the Mississippi, though without any allowance for additional compensation. He was besides directed to receive the emigrant Indians from Georgia and the adjoining states, at the mouth of White river, and to provision and transport them west of Arkansas. On the 22d April, 1829, the reservation, above referred to, was sold by the United States with all the improvements made upon it; the proceeds were two thousand and fifty dollars, and were applied to the benefit of the Indians on the new territory to which they removed. The reservation in question was purchased by Mr. Duval himself, and remained in his possession and that of his representatives, until the 26th April, 1832, when the sale was cancelled by the secretary of war, on the ground that such a purchase ought not to be made by an Indian agent. To this decision

his representatives assented, and the sum given by Mr. Duval was repaid.

After his return to the agency, for a period of fourteen months, Mr. Duval received and disbursed very large sums of money in the performance of his various duties. He failed, however, to render any account during the whole of that time, by reason, as was afterwards alleged, of his constant engagement in the public service. After waiting till the 15th January, 1830, the secretary of war informed him that the provisions of the law of 31st January, 1823, relative to punctual settlements, being positive, and the accounting officers of the treasury having reported his failure to comply with them for so long a period, no other course was left than his removal. On the 15th September, 1830, Mr. Duval died in Arkansas, no adjustment of his accounts having been made. In the spring of 1832, his representatives presented an account of the disbursements made by him, and his various claims for expenditures, allowances, and compensation, which resulted in a balance alleged to be due to him from the United States, of three thousand nine hundred and sixty-five dollars and fifty-one cents. On an examination of this account by the accounting officers of the treasury, numerous items of charge were rejected as inadmissible, or not sufficiently proved, and on the 26th April, 1832, according to their report, he was at the time of his death actually indebted to the United States in the sum of eleven thousand five hundred and thirty-eight dollars and fifty-four cents, the debt to recover which this suit was brought.

The difference between the two accounts, amounting altogether to fifteen thousand five hundred and four dollars and five cents, was made up of numerous charges which were classed under the following general items; viz.

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| 1. The rent of his house for the agency, from 1st Oct. 1826, to 31st Dec. 1829, | $ 390 00 |
| 2. His expenses and compensation at the treaty of 6th May, 1828, | 1064 01 |

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|---|---|
| 3. Expenses of the Indian delegation, | 2429 13 |
| 4, 5. Horses and steamboats for transporting emigrating Indians, | 1158 00 |
| 6. Loss of his horse and his expenses at an Indian council, | 147 50 |
| 7. His compensation as Choctaw agent, | 500 00 |
| 8. A sum paid T. Graves under the treaty of 6th May, 1828, | 1125 00 |
| 9. Purchasing looms for the Indians, | 54 46 |
| 10. Sending a special messenger to Washington, | 250 00 |
| 11. Services of an interpreter to the Indian delegation, | 300 00 |
| 12. Forage for his own horses, | 466 64 |
| 13. Expenditures on the agency house above $2000, | 679 60 |
| 14. Expenditures on the cotton gin above $700, | 1170 94 |
| 15. Expenditures on the Cherokee reservation before its sale, | 270 35 |
| 16, 17. Expenses and provisions to Indians visiting the agency, | 177 00 |
| 18. Provisions to emigrating Indians, | 891 24 |
| 19. Expenses at the agency for the Indians, | 1017 50 |
| 20. Provisions for and charges on account of emigrating Indians, | 1861 93 |
| 21, 22, 23. Special services and expenditures required at the agency, | 193 00 |
| 24. Expenditures on the reservation while it was in his own possession, | 1427 75 |
| | $15504 05 |

On the 3d June, 1833, the case came to be tried before Judge Hopkinson and a special jury. It was argued by Gilpin, District Attorney, for the United States, and J. R. Ingersoll and Sergeant, for the defendants.

GILPIN, for the United States.

The amount in dispute in this case is large, but it is also important from the circumstances connected with it. Nearly three years have elapsed since the death of Mr. Duval, so that the fullest opportunity has been afforded to elucidate and explain every part of the transactions. The whole accounts have been thoroughly investigated by the accounting officers of the treasury, with the aid of his representatives, and under the immediate inspection of those officers of the government, who have long been versed in all the minutiæ of such accounts, and are well acquainted with the expenditures necessary for an Indian agent.

We are to consider in the outset the duties of the agent, his compensation, and the disbursements he can lawfully claim allowance for. His duties, as defined by law, are to receive and dispose of goods to the Indians on public account, to carry into effect the various provisions of the treaties with them, and to account regularly every quarter. His compensation was at first a salary and certain rations, but in 1818 it was fixed at fifteen hundred dollars, to embrace all allowances for himself, his clerks, and every service connected with his office. His disbursements are either those necessary to his place, or such as are extra and contingent; before he can claim allowance for them, all, even the most necessary, must be accurately vouched; when, however, they are extra or contingent expenditures, a mere voucher of their having been made is not sufficient, they are not left to his own discretion, they must be sanctioned by the Secretary of War, or proper officer of the department.

These rules are to govern us in admitting or rejecting the claims that are now made by Mr. Duval's representatives; such as are strictly within the duties of his office must be satisfactorily proved; such as are not must have the sanction of the department.

The first two items are evidently contingent, and are expressly refused by the treasury for want of the proper sanction. Nor are they just; in the first, rent is charged for his own house

long after one had been purchased by the United States, or at least long after Mr. Duval had received the money to purchase one; and in the second, he was performing the duties of his office at a distance from his agency, but certainly not with more labour, and for this he was receiving his salary. The next three items depend entirely on vouchers of the sufficiency of which the jury must judge. The sixth, however, is clearly within the provision for compensation fixed by law, and to authorise its allowance in addition, the sanction of the department even would scarcely suffice; yet this is entirely wanting. The claim for compensation for the Choctaw agency, is directly at variance with the terms entered into on his appointment, which were, that there should be no additional allowance. The payment to Graves is provided for by the treaty, and was to be made by the United States; it was actually paid at the treasury; and this payment by Mr. Duval was without authority, which he ought first to have obtained. The next item is a matter of proof, the object of the expenditures being within the duties of the agent. The three which follow are altogether contingent, altogether such as an agent ought not to make without previous authority; to send a messenger to Washington at a heavy expense, when the documents could have been transmitted by mail; to employ an additional interpreter when there was one attached to this tribe, and regularly in the service and pay of the United States; and to charge the United States with the keeping of his own horses, when his compensation is fixed by law, and limited to a sum which is expressly to include all the charges for his official acts and services; these are expenditures which, if allowed on the mere discretion of the agent, and without the sanction of those officers whom the law authorises to control him, would lead to the most lavish system. The thirteenth item is an expenditure by an agent directly contrary to his instructions, which limited him to two thousand dollars. The fourteenth and fifteenth are charges that never should have been made to the United States; in their cession the Indians made a 'reservation' of a small tract of land

for their own use; on this a cotton gin was erected for them, towards which the United States agreed to contribute seven hundred dollars and no more; certain improvements which the Indians wanted were also made for them; the disbursements were made by the agent, but were entirely for the benefit of the Indians; any additional ones, therefore, on the house, on the gin, or on the reservation itself, were chargeable to them; they knew the limitation fixed on the buildings; they expressly retained the reservation as their exclusive property; the agent was equally acquainted with both circumstances; the former never expected these payments to be made by the United States, and the latter had no right to charge them with them. Most of the charges embraced in the eight following items are matters of proof for the jury, but among them are found some, contingent in their character, and being without the sanction of the war department, inadmissible. To the last or twenty-fourth item, there is an evident and unanswerable objection; it has never been disallowed by the treasury; it is not included among the rejected items making up the balance claimed from Mr. Duval. The fourth section of the act of 3d March, 1797, expressly declares, that in suits between the United States and individuals, no claim for a credit shall be admitted upon the trial, but such as have been presented and disallowed by the accounting officers, which is not the case with this item. In fact, the treasury have given the defendants time to produce their proof; they are not disposed to reject it; it is not the subject of controversy now as to its principle; there is nothing that makes it yet a proper matter for the investigation of this tribunal. 1 Story's Laws, 464. 2 Story's Laws, 1189. 1191.

J. R. Ingersoll and Sergeant for the defendants.

The existence of a suit does not in any degree authorise the inference that there is any, the smallest, amount unaccounted for by the public officer. It does not necessarily imply that the accounting officers of the government ever thought that such was the case. It is perhaps deemed a convenient mode of settling an account which must be settled somewhere, and justice

is not anticipated in her results by any of the preliminary proceedings.

The argument on behalf of the United States seems to presume, that the decision here is to be controlled by what the public officers at Washington have done, or have refused to do. This is not so. The whole matter is before the court and jury, and on the broadest equitable principles. It is no doubt true, that in settling accounts at the treasury, the accounting officers require the sanction of the head of the department for an expenditure evidently contingent; but this court and jury do not require his sanction; they have the same power to make the allowance that he has, and so the supreme court has expressly decided. More than this, if the accounting officers or the secretary should reject a claim because not authorised by law, this court could allow it, should they deem it equitable. It has been alleged, that, as the claim for many of these expenditures rests on the usage of the department in allowing them, and the sanction of the secretary has been always given to such allowances, consequently his sanction forms part of the usage; but to this it is answered, that the sanction of the secretary is not a constituent part of the usage, which is limited to the thing done and the circumstances necessarily attendant on it; if it has been usual for the secretary to allow a charge, and he shall refuse to do so in a particular instance, the court and jury are to do what he ought to have done. These principles have all been clearly established by the supreme court. United States v. Macdaniel, 7 Peters, 1. United States v. Ripley, 7 Peters, 18. United States v. Fillebrown, 7 Peters, 28.

The first item of charge hardly admits of a question; the United States agreed to furnish an agency house, and one fit to live in was not finished till 31st December, 1829; of course they must pay the rent till that time; nor did Mr. Duval receive any money until he bought the new house; he was merely authorised to draw it before; it was a credit, not a payment. To his compensation in effecting the treaty he is justly entitled; his great services are proved; it was not part of his duty as an

Indian agent; he was expressly requested to act by the government; and similar allowances have been made in cases exactly similar. The third, fourth and fifth items were rejected for want of vouchers, which have been furnished at this trial, and of course remove the objection. The expenses of Mr. Duval, at the council, have been admitted by the accounting officers, but the item has been rejected because it includes a charge for the loss of his horse: we have proved this loss to have been in the service of the United States, and occasioned by duties he was performing for them; a circumstance giving him an unquestionably equitable claim. His charge as Choctaw agent is for his expenses; the agreement that he was not to receive additional compensation, never was intended to deprive him of the repayment of expenses, expressly occasioned by his assuming gratuitously a new duty. The double payment to Graves is an error which ought not to fall on Mr. Duval; he was authorised to make it under the general agency connected with the treaty; he did so; after he had actually paid it in Arkansas, the treasury pays it, without inquiring, at Washington; the blame is there, and Mr. Duval must not be made to suffer. We have fully proved the expenditures in the ninth item. Those in the tenth and eleventh are of the most equitable character; important accounts and vouchers were to be transmitted through the wilderness; they related to the fulfilment of an interesting treaty; the expenditure of thousands of dollars depended on them. So in the employment of an interpreter, surely in adjusting an important treaty, it was no extravagant exercise of discretion for Mr. Duval to have his own interpreter, in addition to the one belonging to the Indian delegation; the United States were the sole gainers by it, and to throw the expense on their authorised agent would be manifestly unjust. Mr. Duval was allowed to purchase two horses at the expense of the United States; he did not do so, but employed his own in their service; to pay him for their forage is surely most equitable; and it never was intended that, under such circumstances, it should be deducted from his compensation. The limitation of two thou-

sand dollars for the agency house was applicable to the cost of the building; this excess has arisen from the land, and that land has since become the property of the United States: will they make the agent pay from his own pocket for property they hold themselves, especially when he has proved the bona fide expenditure of the sum in a purchase directed by them? The expenditures on the reservation were made by Mr. Duval; no doubt at first for the Indians, but by the treaty the United States agreed to sell this reservation and give the proceeds to the Indians; they have done so, and paid them the whole sum it brought with the improvements; but at the time of sale these improvements had not been paid for, and the United States were bound either to deduct their cost from the sum received and pay it to Mr. Duval, who made them, if the treaty meant the net proceeds; or if it meant that the Indians were to receive the whole for a gift as it stood, then they were to pay off the cost of the improvements besides; in either case, as the sale of the property was entrusted to them, Mr. Duval has a right to look to them for this payment. The remaining items, except the last, depend entirely on the sufficiency of the proof, and that offered on this trial seems in most respects amply sufficient. In fact, the only cases not almost indisputable, are those of the allowance to the blacksmith, M'David, for his assistant in the nineteenth item, and to Flower, for his services as a commissary in furnishing provisions: it is alleged that these are included in the general payments of their respective contracts, but the evidence appears sufficient to show that they were extra expenditures, and entitled to a separate allowance. The twenty-fourth item ought to be submitted to the jury; it is part of the same transaction which should be definitively closed by their verdict; the charge itself is very just: Mr. Duval purchased the land without any idea that the government would disapprove of it; he expended this money on it when it was his own; the United States took it from him and now retain it; they have the benefit of all he did, and of course ought to pay for it. It has, however, been submitted to the treasury and there suspended, which

is tantamount to a disallowance; it therefore forms a set-off, such a one as would be indisputable between man and man; such a one as the act referred to by the District Attorney never meant to exclude; the intention of that law was, to give the United States an opportunity of examining, through its officers, the claims presented, before they were submitted to a judicial investigation; this has been done, and the accounting officers have not been satisfied of their correctness; in no respect, therefore, will the United States suffer any injustice by its admission, while the defendants will be subjected to great hardship by a refusal.

Gilpin, for the United States, in reply.

It has not been contended that the jury are to be bound by the decisions of the accounting officers; but merely that their reasons in rejecting many of the claims are entitled to great weight, as persons well acquainted with the usages in regard to such agencies, and the nature of the vouchers, and having no interest whatever. This ought especially to weigh in the present case, because these accounts have been all made up since the death of Mr. Duval, and every rejected item is presented for the first time since that event, though the actual disbursements took place before. It is to be remembered too, that though the amount in dispute is large in itself, yet it is not so in comparison with the aggregate of Mr. Duval's disbursements, which was probably more than a million of dollars.

The principles which govern the allowances here are simple. First, to allow Mr. Duval the specific sum for his own compensation and expenses which the law authorises. Secondly, to require adequate proof of all his disbursements. Thirdly, where the disbursements have not been specifically authorised by law or settled usage, to require the sanction of the secretary of war. To the last, which embraces most of these disputed charges, the defendant's counsel object. They deny the necessity of the allowance of the secretary in contingent expenditures, and assert that if the jury think them proper, that is sufficient. To this it is answered that the law means to require

the secretary specially to superintend all contingent expenditures, he is held responsible for the disbursement of the contingent fund for Indian affairs, he is obliged to report annually every payment made from it, he knows what an agent in remote districts, in Arkansas for instance, ought to apply it to, which surely a jury in Philadelphia cannot. The allowance therefore of the secretary converts what is contingent into a specific expenditure. The appropriation by law is general when first made; this sanction makes it specific; it does what congress have done in many points, and would have done in all, could they have known every want of the agency. When the defendants rest their claim on a usage of the department, they seem to admit this principle; for that usage is itself an implied sanction. It is in their application of the usage to their particular claims that they fail; a uniform or general admission of the very same allowance must be proved, which they have failed to do; in the case of Macdaniel, the express approval of the same services for which he claimed compensation was proved on previous and repeated occasions, and the question was as to the amount of compensation; in the case of Fillebrown there was an implied contract to do the act previously ascertained, the amount of compensation alone was left unsettled.

It is contended therefore that in regard to all disbursements, falling within the class which is to be paid from the appropriation for "contingencies," the following rules are to govern the allowance. 1. That the appropriation is made by law, to be applied only to such cases as the secretary of war sanctions, and consequently, that all claims for "contingencies" not sanctioned by him, must be allowed by the legislature, not by the courts. 2. That if such claims could be the subject of judicial allowance, still, in the absence of any express contract between the government and Mr. Duval, as to the services performed or the amount to be paid for them, the evidence of the implied contract must rest upon the usage proved in the cause; that according to such usage the allowance for contingencies, both

as to the necessity of the services and the amount to be paid for them, has been invariably governed by the decision of the secretary of war in each particular case; that therefore no claim for contingencies ought to be allowed to the defendants, which has not been specifically sanctioned by the secretary of war. 3. That there was an implied contract between Mr. Duval and the government, to take such sum for every contingent service performed by him, as might be allowed by the existing head of the department at the time of settling his account; that therefore his representatives can claim nothing for contingent services without such allowance. These principles are not in opposition to the decisions of the supreme court, which have been cited; they place the judgment on an officer who is well fitted by his situation to form a correct one, and whom congress have obliged to report annually and made responsible; to do otherwise would be to submit to the uncontrolled discretion of a subordinate agent, in a remote place, who is amenable to no one whatever.

If these rules be correct, then the claims of Mr. Duval for allowances for the rent of his own house from 1st April, 1827, to 31st December, 1829; for his services at Washington, in procuring the acceptance of the treaty of 6th May, 1828, by the Cherokees; for the loss of his horse in going to an Indian council; for forage of his own horses from 1st January, 1826, to 1st August, 1830; and for special services rendered by himself at the agency; not having been sanctioned by the secretary of war ought not to be allowed. They were all services of his own, rendered in the performance of those duties for which he received by law a specific compensation, and if the secretary, who knew all the facts and circumstances, did not consider them as extraordinary, they ought not to be paid for from the contingent fund. The same remark may be made as to his employment of expresses and an additional interpreter; they are expenditures in relation to the ordinary duties of his agency, of the propriety of which the head of the war department could best judge, as well as of the fund from which they

ought to be paid. As to the claims of Mr. Duval, for allowances for disbursements made by him on the property and improvements called "the Cherokee Reservation," mentioned in the fourth article of the treaty of 6th May, 1828; viz. for building and repairing the agency house, over and above the sum of two thousand dollars, either before or after the sale of the reservation; for erecting a cotton gin, over and above the sum of seven hundred dollars; and for expenditures charged by him to "the Cherokee Reservation," and made previous to the sale, they ought not any of them to be allowed, because they are not legally chargeable against the United States. In the first two expenditures Mr. Duval was allowed certain sums by the United States, which he received and expended; he has no right to ask more from them; the land belonged to the Cherokees; all that Mr. Duval expended on it, whether on the buildings in addition, or in improvements, was for them and they must pay him; he had no lien on the land; it was sold by the United States under the treaty and the proceeds paid over to the Cherokees; if the sale was incorrect or imperfect it is to be sold again, and if it brings more the surplus must be paid to them also; but until actually sold it was or is the property of the Indians, and to them Mr. Duval must look for repayment. The same principles are to be applied by the jury in considering all the other items, except the last, which falls under the class of contingencies; the rest, which are matters of proof, must depend entirely on the evidence. As to the twenty-fourth item, the law is too clear to admit of doubt; it requires expressly that every credit claimed shall have been disallowed; this has not been done; a suspension is not a disallowance; a suspension followed by a suit for a balance which includes the sum suspended, might be an implied disallowance; but a sum presented, suspended, and not embraced in the amount claimed on suit by the United States, is not a disallowance either express or implied; on the contrary, it leaves the inference that the claim is believed to be just, and

will be admitted on proper proof being produced, for which time is now given.

Judge HOPKINSON delivered the following charge to the jury:

It is more than two weeks, that your attention has been closely and patiently given to this interesting and complicated cause, in which an endless variety of facts, intermixed with questions of law and usage, is involved. The long account which has been spread before you, contains twenty-four principal items which are disputed, and which again are subdivided so as to amount to nearly one hundred subjects of controversy. It is now my duty to present to your consideration such views of the case, as I may believe will assist you in making up your verdict. I might, perhaps, perform this duty with more order and in a better shape, by postponing the charge until tomorrow; but I have determined to proceed with it at once, while the evidence and arguments are more fresh in our recollection than they may be twenty-four hours hence.

The items for which the defendants now claim a credit have been rejected by the officers of the treasury at Washington, and, as to some of them, the refusal is justified by insisting upon the usage of the department in settling such accounts. You will understand that an usage, which is to govern a question of right, between parties in this court, must be so certain, uniform, and notorious that you may say that it was understood and known to the parties. In such a case we cannot say that it is allowed to change or control the contract between them, but rather that it is a part of the contract, and was so understood, and, of course, is as binding upon them as any other stipulation in it. The usages of a department of the government in settling an account with an individual, unless it be such a one as I have described, can have no influence here.

There is another question of somewhat the same character, upon which it is proper I should be very explicit with you, and if I am mistaken in my view of it, the dissatisfied party

has the means of correcting my error. It has been repeatedly and ardently urged upon us, by the District Attorney, that as to certain charges in this account, that is, those which are embraced in or applicable to what is called, "the contingent fund," the decision upon them by the secretary of war is final and conclusive, that his decision may not be reversed and disturbed here, and that in case of hardship or injustice in the refusal to make allowances to a public agent for such charges, congress only can grant relief. I entirely and distinctly dissent from this doctrine, although we are assured that such is the understanding and practice of the war department, and the treasury officers at Washington. If this cause comes to this court and jury trammelled, nay decided, by the judgment of the secretary of war, to what purpose has the party a right to bring it here; the trial is an unreal mockery, and you and I are the mere automata of a stronger hand, the agents to execute the decree of a higher power. I say to you, that in every case where the law of congress allows or refuses a charge in the account of a public agent, the secretary, as well as you and I, are bound by that law and must conform ourselves to it; but that in the cases where the law is not imperative, but confides to the secretary an authority, a discretion to allow or disallow a charge, as he may deem it to be just and equitable, or otherwise, then when the cause comes to this court for revision and examination, the court and jury have the same discretion and authority over such charges as the secretary had in the first instance, and we may exercise our judgments upon them in allowing or disallowing them, as we may think justice and equity demand. The opinion of the secretary will have the influence to which his character and station entitle him and no more. As an authority it is nothing.

I should be diffident of using this language to you if I were not supported in it by the highest judicial tribunal of our country. I understand the doctrine of the supreme court to be such as I have given it to you. Let me repeat it. When a certain charge is prohibited to a public

agent by the law under and by which he is appointed, the allowance of such a charge would be a violation of the law, which is not permitted either to the court or the head of a department. But when there is no such prohibition, but the objection or defect is the want of an express authority for it, and it is therefore not a subject of strict legal right, yet nevertheless if it is supported by a clear equity arising from a bonâ fide performance of a service, or the bonâ fide expenditure of money for the public service, there a discretion is properly and indeed necessarily vested in the head of the proper department to allow the charge. If it were not so the consequence would be, either that the service and interests of the government would often suffer, or that a meritorious officer would be ruined by his fidelity and zeal. Whenever and wherever the head of a department may exercise his discretion upon such a charge, and in the use of that discretion, has refused the allowance, and the court and jury before whom the case shall come for trial, think that the secretary ought to have made the allowance, they may do it. This doctrine is sustained by the supreme court in the cases of the United States v. Macdaniel, (7 Peters, 12;) in that of the United States v. Ripley, (7 Peters, 25, 26;) and in that of the United States v. Fillebrown, (7 Peters, 48.)

I hold then that you are not bound by any thing the secretary, the comptroller, or the auditor has done with the charges in this account, be they contingent or not contingent.

We must now make a review as brief as possible, of the particular subjects of controversy in this cause. The treasury transcript, which is primâ facie evidence of the indebtedness of the defendant, shows a balance due from him to the United States of eleven thousand five hundred and thirty-eight dollars and seventy-five cents. This stands good against him, unless he can extinguish or reduce it by showing that he has just claims or is entitled to credits which have been refused in the settlement of his account at the treasury. He has presented to you certain claims and credits which were not allowed at the

treasury, and you are now to decide whether they ought to have been allowed; whether they are such as the justice of his case entitled him to.

(The judge took up the several items in their order, recapitulated the evidence, and made his remarks on each of them. It is only as to some of them that it is thought now necessary to repeat his observations.)

Item II. This is for charges of an Indian treaty at Washington. It consists of two parts. 1. His expenses. This was allowed at Washington. 2. For his services in negotiating the treaty. He had no appointment as a commissioner for that purpose; but did he render the service of one? It is proved that he did, and that his services were indispensable to the success of the negotiation. Did he volunteer his services? If he did, he is not entitled to this charge; but it is proved that he acted by the request of the secretary of war, and that he did the duties of a commissioner. It was an extra service, not within the line of his duty as an Indian agent. His compensation should be what is allowed in similar cases, for the same services. If he did the duties of a commissioner, he is entitled to the compensation of one.

Item VIII. This is a charge of eleven hundred and twenty-five dollars, paid by the defendant to one Thomas Graves, for damages for spoliations. The treaty appropriated eight thousand seven hundred and sixty dollars, for spoliations committed on the Cherokees; also a further sum of twelve hundred dollars for Graves; also five hundred dollars for one Guest, and five hundred dollars for one Rogers. All these sums were put into the hands of the agent to be distributed according to the terms of the treaty. The agent, it is not doubted, paid to Graves the money due to him; but it appears that the government also paid it to Rogers, on an order drawn by Graves. It has thus been twice paid. Who is to bear the loss? The party on whom the fault rests; the party who incautiously made the payment. The money was given by the government to Duval as their agent, to be paid by him to Graves; he therefore not

only had the authority to pay it, but it was his duty. He did pay it honestly and in good faith, on the order of Graves, in several sums at different times ending in 1830, and part of it was paid by Mr. Murray after the death of Mr. Duval. After Graves had thus given orders on Mr. Duval for the whole amount due to him, which orders were paid without a suspicion of fraud, he most dishonestly gave an order on the government to Rogers for twelve hundred dollars, which was presented by Rogers and paid to him by the government. Now is there any doubt where the fault, the want of due caution, was? When this order was presented, the government well knew that the whole amount to be paid for spoliations, of course including that due to Graves, had been put into the hands of their agent, Mr. Duval, to be by him distributed to the persons entitled to it. Yet without making any inquiry why this order was drawn on them, why Mr. Duval had not been applied to, or if he had, why he had not paid it, or whether it was or was not paid, they accept and pay the order thus fraudulently drawn, and as to which the fraud would have been detected by the exercise of the most ordinary prudence. This is not all; Graves had another claim for one hundred and seventy-five dollars, under the general appropriation for damages, by the same treaty, but the specific appropriation only was put into the hands of Mr. Duval. The claim for one hundred and seventy-five dollars, which if due was properly drawn for on them, was refused, while the other was paid. The only ground taken now for refusing to Mr. Duval the allowance, is that the payments made by him, on the orders of Graves, were not presented in the settlement of Mr. Duval's account of 1830 and 1831. This is doubtful. Mr. Murray swears that they were then presented; the auditor says they were not; of the fact you will judge; but whether they were or were not, the defendant has a clear right to the allowance.

Item XIII. This is a charge of six hundred and seventy-nine dollars and sixty cents for erecting the agency house. Some important questions are involved in it. In 1827 a house was

purchased by Mr. Duval for seven hundred and fifty dollars, with the site. It was but a log cabin with a frame store house. The new building, erected about two miles and a half from the old one, cost, with the seven hundred and fifty dollars paid for the old one, the sum of two thousand six hundred and seventy-nine dollars and sixty cents. The agent had distinct orders not to exceed the sum of two thousand dollars for this object; he was expressly limited to that amount. He now presents a charge against the United States for six hundred and seventy-nine dollars and sixty cents, the excess of his expenditure beyond his orders. The disbursements are said, by the witness, to have been made with economy. But will this justify the agent for disregarding his orders and exceeding his authority? Nothing can be more dangerous than the admission of such a principle. It is like any other case of principal and agent. The agent of the United States stands bound by the same law, as the agent of any individual. In both cases the question is; has he exceeded his instructions clearly and distinctly given, in which there is no equivocation, and nothing left him but to obey? If he has, he must answer for it; all he has done beyond his authority is of himself and for himself, and he must take it upon himself. It is not like the case where an agent, having no specific instructions, and being called upon to act, exercises a sound and honest discretion. In the face of clear and positive orders, there is nothing for discretion to decide. It is pretended that the limitation of two thousand dollars had reference only to the building of the house, and not to the purchase of the land. The purchase of the house necessarily included the land on which it stood. The whole expenditure for an agency house was not to exceed two thousand dollars. In purchasing the reservation, on which this house stood, the log cabin and frame store were valued at four hundred dollars, and the ground at three hundred and fifty. To this seven hundred and fifty he had a right to add thirteen hundred and fifty for bettering the accommodation, and no more. He has exceeded this amount by the sum of six hundred and seventy-nine dollars and sixty cents, which he

now claims from the United States. I think he is not entitled to it.

Item XIV. This was a charge for expenditures in erecting a cotton gin and gin house. These improvements were erected partly in 1827, partly in 1828, and not completed until 1829. The government had allowed the agent to expend the sum of seven hundred dollars; but he had expended beyond that amount eleven hundred and seventy dollars and ninety-four cents, which he now charges to the government. He was allowed the seven hundred. The witness, Mr. Murray, testified that the sum allowed was not sufficient to erect a suitable house. The cotton gin was in the reservation, and was included in the sale of that land. This excess of his authority and orders can hardly be justified. If he found the sum allowed too small, he should have so represented it to the government and waited for new instructions. The excess was not trifling; it was nearly three times the amount allowed. The defendant did not claim this allowance, but gave it up as not chargeable to the government. But there is another view of this charge, which seems to me to exclude the defendant from any claim upon it. By a treaty with the Indians on the 6th of May, 1828, they made a cession of certain territory to the United States, with a special reservation of a part of it. By this reservation, the part reserved with all the improvements on it, was agreed to be sold by the United States, and the proceeds of the sale were to be applied to the benefit of the Indians on the new territory to which they removed. The cotton gin and improvements in question were erected upon this reserved part, and of course were to be sold with it. The sale was accordingly made. The proceeds were the sum of two thousand and fifty dollars, which were fully and faithfully applied to the use of the Cherokees, in conformity with the agreement. This sum was the proceeds of the land and of all the improvements on it, and of course, when the United States paid over this sum to the use of the Indians, they paid the value of those improvements as well as of the land. It is now contended that the government must pay the defend-

ant for these same improvements; thus paying for them twice; once to the Indians, for whom they were erected on their own territory, and again to the defendant, who had erected them at his own hazard, so far as he exceeded his authority in their cost. Nor has the defendant any reason to complain: he is only sent back to the persons for whom and on whose credit, to wit, the Cherokees, he made these improvements. He had no idea that the United States were answerable to him for them: so he says in his memorandum of the 20th May, 1828. If he were living we cannot suppose he would make this charge. Mr. Duval was himself the purchaser of the land, with the improvements, at the public sale. It is true that this sale was afterwards cancelled by an agreement between his representatives and the United States, by which he transferred his right to them, on the ground that he, being the Indian agent, could not be the purchaser at such sale; but I do not see that this circumstance gives any equity to this charge which can address itself to this court and jury. If his purchase was illegal and void, by reason of his agency, he gave up nothing by cancelling it, or by the transfer of his right to the United States. If his purchase was legal, the surrender was voluntary and without condition. If his representatives intended to charge the United States, on account of this transfer, with this debt, in addition to the amount which the land sold for, they should have said so, and made it a condition of the transfer. The only consideration which appears to have been given by the United States, or asked by Mr. Duval's representatives, is the repayment to them of the sum of two thousand and fifty dollars, which he had given for it at the sale. Now they would add nearly twelve hundred dollars to this consideration, without any notice of any such intention or expectation. Suppose this sale or transfer by them had been made to one of you; would you expect to be called upon to pay, not only the stipulated price or consideration, but also to discharge an old debt, not charged upon the land, which the Cherokees owe to Mr. Duval for the very improvements included in your purchase and paid for by you? I am very

clear that this charge ought not to be allowed, but that the Cherokees, the original debtors, at whose request, on whose credit, and for whose use the improvements were made, must be looked to for payment. They have indeed received compensation for them in the price paid to them on the sale of the land with them.

Item XV. This charge must also be disallowed. These expenditures were made on the land, when it belonged to the Indians, or at least they had the beneficial interest in it. They were on the tract reserved for the benefit of the Indians. Mr. Murray, the witness of the defendants, who was connected with the agency as the clerk of the agent, and a member of his family, expressly says, that he believes Mr. Duval considered the Cherokee nation as responsible to him for this expenditure; that he considered the whole matter to be between the Cherokees and himself, and not with the government. Indeed the charge is not to the United States, but to the "Cherokee Reservation." Mr. Duval never presented the charge to the government in his life time.

Item XXIV. This is a charge of fourteen hundred and twenty-seven dollars and seventy-five cents, for expenditures on the Cherokee reservation. The counsel for the defendants states that these expenses were made on the land, after the purchase of it by Mr. Duval, and while he thought it his own; afterwards the sale to him was cancelled, and the land, with these improvements, transferred to the United States, the secretary of war saying that Mr. Duval, being the agent of the government, was prohibited from purchasing. The United States having thus taken these improvements ought to reimburse Mr. Duval for them; he made them believe that he had a right to the land. But we are precluded from taking this charge into our consideration. We need not therefore take into our consideration the objections that are made to it, to wit, that it has no date, no signature, no bills or receipts, nor any thing to prove the expenditures for which a reimbursement is claimed. The preliminary difficulty is that this charge has

never been presented to the department for their allowance or disallowance. It has of consequence never been rejected by the accounting officers of the treasury. By the fourth section of the act of congress, of 3d March, 1797, it is enacted that in suits between the United States and individuals, no claim for a credit shall be admitted upon the trial, but such as shall appear to have been presented to the accounting officers of the treasury, for their examination, and by them disallowed, in whole or in part. This has not been done, at least it does not appear that it has. No disallowance of this item appears any where here. It has been assimilated to some items which have been suspended though not absolutely disallowed, and yet have been the subject of examination on this trial. I answer; 1. That no objection was made to them by the officer of the United States, who has appeared for them on this trial, and has their rights in his charge; and at most the argument could only prove that the suspended item ought not to have been inquired into, but does not prove that this may. 2. But I think that it does now appear that these items, although at first only suspended, are now disallowed, because the suit brought by the United States, claims a balance which necessarily excludes these items. No particular form of allowance or disallowance is required by the act. It is enough if it appears that they are disallowed.

The Jury found a verdict in favour the United States for the sum of three hundred and forty-eight dollars and twenty-nine cents.

At the time of giving their verdict they presented a paper to the court, in which were stated those items of account in dispute that were allowed, and those that were rejected by them. From this it appeared that they had refused Mr. Duval a credit for items, seven, thirteen, fourteen, and twenty-four, altogether; and also for that part of item two, which consisted of a claim for compensation; that part of item nineteen which consisted of the materials used by M'David, the blacksmith; and

that part of item twenty which consisted of an allowance to Flower for his services as a commissary. All the remaining items claimed by the defendants were allowed.

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On the 24th June, 1833, the District Attorney moved for a new trial, and filed the following reasons:

1. Because the jury allowed the claim of the defendants for one hundred and forty-seven dollars and fifty cents, including one hundred and ten dollars for the loss of a horse of the said Edward W. Duval, although the defendants were not entitled by law to such allowance; although there was no evidence that the loss of the horse was occasioned by his being employed in the service of the United States; and although the court charged that they were not entitled to such allowance unless such loss was so occasioned.

2. Because the jury allowed the claim of the defendants for three hundred dollars, for disbursements made by the said Edward W. Duval to an interpreter at Washington, although the defendants were not entitled by law, to such allowance; although there was evidence, that the said interpreter was not entitled to the same for any services rendered by him, that the allowance was not claimed by the said Edward W. Duval in his life time, and that it was not paid till after his death; and although the court charged the jury unfavourably to such allowance.

3. Because the jury allowed the claim of the defendants for four hundred and sixty-six dollars and sixty-four cents, for forage of horses of the said Edward W. Duval, for four years and upwards, although the defendants were not entitled by law to such allowance; although there was evidence that the said Edward W. Duval never claimed the same in his life time; and although the court charged the jury unfavourably to such allowance.

4. Because the jury allowed the claim of the defendants for two hundred and seventy dollars and thirty-five cents, for disbursements made by the said Edward W. Duval on the property called the Cherokee Reservation before its sale, although the defendants were not entitled by law to such allowance; although there was evidence that the disbursements were made at the request of the Cherokees for their own benefit, and on the understanding by the said Edward W. Duval that they were to be paid for by them; and although the court charged the jury against such allowance.

5. Because the jury allowed the claim of the defendants for eight hundred and thirty-seven dollars and fifty cents, including disbursements made by the said Edward W. Duval to James M'David for the board and wages of a striker, although the defendants were not entitled by law to such allowance; although there was evidence that the same had been included in previous payments; and although the court charged the jury unfavourably to such allowance.

6. Because the jury allowed the claims of the defendants for thirty dollars and twenty dollars, for travelling expenses of the said Edward W. Duval, although the defendants were not entitled by law to such allowance; although there was evidence that the said Edward W. Duval never claimed the same in his life time; and although the court charged the jury unfavourably to such allowance.

7. Because the verdict of the jury was against law.

8. Because the verdict of the jury was against the evidence.

9. Because the verdict of the jury was against the charge of the court.

On the 10th September, 1833, the motion for a new trial was argued by Gilpin, District Attorney, for the United States, and Sergeant for the defendants.

Gilpin, for the United States.

It is unnecessary, and would be improper in this stage of the cause, to renew the argument on the points of law submit-

ted to and decided by the court, after so full an opinion as that expressed in the charge to the jury. This application is, therefore, limited to those items on which the verdict was in opposition to the opinion or direction of the court; in which it was against the law as laid down in the charge, or against the weight of evidence. The statement presented by the jury, at the time of rendering their verdict, enables us to discover these without difficulty, and to ascertain exactly in what points their final decision was erroneous, on either ground.

The first objection arises from their allowance to Mr. Duval for the loss of his horse in going to an Indian council, which forms part of the sixth item. This was against law, because it was not established by the evidence that the horse was lost on account of its employment in the service of the United States, and no allowance is lawful except for such a loss. The law fixes the entire compensation of the agent at fifteen hundred dollars per annum, in which his necessary expenses are included, and all the evidence of any customary allowance goes at most to cases where the horses are specially employed for the public service. The charge of the court was in accordance with this view, declaring expressly that the loss must be occasioned, not merely in such service, but by it.

The second objection is to the allowance of the eleventh item, for the services of an interpreter to the Indian delegation. This is altogether illegal; it is for services rendered to the Cherokees, and as long since as 1828; there was a regular interpreter to the delegation who was paid by the United States; and this charge never seems in any manner to have been contracted for or allowed by Mr. Duval himself in his life time. Though undoubtedly questions of fact are to be left to the jury, yet this is a decision so much against the weight of evidence, that it affords quite sufficient ground for the exercise of the right to grant a new trial. Kohne v. Insurance Company of North America, 1 Washington, 123. Smith v. M'Cormick, 2 Yates, 164. Swearingen v. Birch, 4 Yates, 322.

The third objection is to the allowance of the twelfth item for the forage of Mr. Duval's horses, which was never claimed by him at all during his life, and is now brought forward by his representatives in one general charge, extending back several years before his death. The evidence of Messrs. Stewart and M'Kenney, adduced by the defendants to prove the usage of the war department, at most, sustains allowances for a special or temporary employment of horses by an agent, never an annual allowance. This is a regular charge per annum for nearly five years. It is in direct opposition to the charge of the court, and is unsupported by any evidence.

The fourth objection is to the allowance of the fifteenth item, the expenditures on the Cherokee reservation before its sale. These expenditures were incurred on the property while it belonged to the Indians; the improvements were made at their request, charged to them in the accounts of Mr. Duval, and, as he himself stated to the department, were to be paid by them.

The fifth objection is to the allowance of that part of the nineteenth item, which embraces the board and services of the assistant or striker of the blacksmith, employed at the agency. This was clearly against the evidence. It was proved that the assistant was his own slave, and that the claim was carried back for several years, though intermediate bills had been paid, but this charge was included in none of them.

The last objection is to the allowance of the twenty-third item, which consists of a charge for Mr. Duval's own travelling expenses. This, like the preceding claims of a similar kind, is properly embraced in the salary of an agent; it was for ordinary expenses on official and necessary business; it was not charged by Mr. Duval during his own life; and no evidence has been produced that he ever considered it as a ground for a special credit.

The Court intimated to the counsel for the defendants that it was unnecessary to argue the first, second, fifth and sixth objections; and, understanding that they were willing to give up the verdict so far as it allowed the amount of the fifteenth item,

for expenditures on the Cherokee reservation, he was directed to confine his reply to the third reason on behalf of the United States for a new trial.

SERGEANT, for the defendants.

The argument in support of this objection involves the point of law asserted by the District Attorney on the trial of the cause, that the sanction of the secretary of war is necessary to authorise the allowance by the court and jury of the claim presented. The court have already overruled that ground, and the only question which the jury had to consider, in regard to this allowance, was, whether these horses were necessary to the service of the United States. It never could be the rule of the department that, where an emergency arose, the agent was not to meet it; that he was first to send to Washington; on the contrary, it is necessary and proper that he should be at liberty to exercise a reasonable discretion. It appears from the evidence of Col. M'Kenney, that there was no positive rule on the subject, but that where an agent was called on to perform unexpected but necessary services, an allowance was made suitable to the circumstances; he adds that horses are necessary for the agent; that when kept for the use of the United States, the expense was allowed, and that two, the number for which this forage is claimed, are reasonable. The defendants have proved, by the evidence of Mr. Murray, that these horses were used only for the public service; if, therefore, the expense of keeping them is refused, the indispensable business of the United States will have been performed, at the expense of Mr. Duval and his representatives.

But this, at any rate, is not a ground for a new trial; the whole matter, as to law, usage and fact, was fully submitted to the jury; it was contested at large by the District Attorney; and it was specially discussed by the court in the charge. It was allowed because it was an expense bonâ fide incurred, of which the United States derived the benefit; and believing this, the jury were right in allowing it. It is immaterial whether it was claimed or not during the lifetime of Mr. Duval; if the

jury were satisfied that he was justly entitled to it, they acted as properly in giving it to his representatives, as they would have done in giving it to himself, had he lived.

GILPIN, for the United States, in reply.

The verdict of the jury on this item is sustained, because, as is alleged, the usage of the war department admits such an allowance, because these horses were for the express service of the United States, and because it is altogether immaterial whether the claim was made before or after the death of Mr. Duval. The evidence of Messrs. Stewart and M'Kenney, officers long in the Indian department, does not establish an allowance under circumstances exactly similar; the instances they cite differ from it in a material point; they refer to horses used on special occasions, on emergencies, and for particular objects, while this is an annual and permanent charge. It is true they were employed in the service of the United States, but all the agent's expenses, as such, were equally incurred in their service: this is not enough, it must be shown that they were in some unusual, extraordinary service, which has not been done. This fact makes the time and manner of presenting the charge material: had it been a subject of special expense or charge, it would have been presented by Mr. Duval; and his omission to do so, during his life, affords strong ground to conclude that he did not consider the case as one falling within the line of special allowance, to which the witnesses above named have referred, and which undoubtedly was well known to Mr. Duval.

On the 13th December, Judge HOPKINSON delivered the following opinion:

When a controversy, consisting almost entirely of questions of fact, has been fully and fairly tried by an impartial and intelligent jury, each party having produced all the evidence in his power, and no expectation being entertained by either of furnishing any additional facts, a court would yield, with extreme reluctance, to an application to set aside the verdict. The cause now before us occupied the attention of this court, and such a jury

as I have described, for more than ten days, and every part of it was laboriously examined and discussed. There is no hope that anything can be added to it, either in the way of argument or evidence, on another trial. In such a case the objections to the verdict should be cogent indeed, before the court would allow them to prevail against it.

In addition to this general principle, there are circumstances in this case which make me very unwilling to disturb the decision of the jury. The controversy arose on a long and old account, in relation to transactions in a distant wilderness, in part with savages, and in part with men not much above them in education and a knowledge of the forms of business. The transactions themselves were sometimes the result of sudden emergencies, when the public service required a prompt action, and an observance of exact regularity was impossible without danger to the service. It is obvious that in such an agency, it would scarcely be just or reasonable to call for, at this distance of time as well as place, a full and satisfactory explanation of all the doubts and difficulties which may present themselves here, in the investigation of these complicated affairs, and of the various items, some of them very small, which are brought into the account. Unfortunately one of the parties, from whom such explanations might have been received, is dead, and his representatives have been obliged to make up his case from his papers as they found them. Such a case seems to be peculiarly fitted for the broad and equitable jurisdiction of a jury over the evidence of a cause, and the belief they will give to it. It should not be altogether overlooked, too, on a question of granting a new trial, addressed to the discretion of the court, which discretion takes for its guide the justice or injustice to the parties that will follow the allowance or refusal of a second trial, that, in this case, the defendants have relied, and must always rely, on the knowledge and testimony of a single witness; that he lives at an immense distance from this place of holding the court, and was, probably, brought here at a great expense; that his presence can hardly be expected again; and that his evi-

dence was of a nature to require a personal examination at the bar, and could not be taken with satisfaction to either party in any other way.

Such circumstances would strongly dispose me to let this verdict stand, although in some instances the jury have not drawn the same conclusions from the evidence that I should have done, and have made some allowances to the defendants, which I should have refused, were I not, on a careful review of the disputed items of this account and the decision of the jury upon them, constrained to say that I find some in which the jury have, in my opinion, rendered their verdict against the plain principles of law, or against the clear and unquestioned evidence of the case. Such errors I am bound to correct, and must be governed by higher considerations even than those which I have stated in support of the verdict. The court must never suffer its controlling power over a verdict to be prostrated, nor the particular circumstances or even the justice of any case, to overthrow the general principles established for the administration of the law, and the security of the rights of all.

The motion for a new trial in this case is made on the part of the United States. The reasons filed, exclusive of the general or formal ones, are six in number. The first, second, fifth, and sixth, relate to the allowance by the jury of certain disputed credits claimed by the defendants in their account, as to which there was evidence given both for and against them, and they were left by the court to the jury on their evidence and equity. Upon these I shall say no more than that I cannot interfere with the opinion of the jury in such cases. As to the fifth, the most important of them in amount, I will remark that the disbursements here charged to the United States were actually made and paid by Mr. Duval to the blacksmith James M'David. The objections made on the part of the United States to the right of M'David to this money, or, at least to that part of it which he charged for his striker, are very strong and have not been well answered or explained;

but, on the other hand, as no pretence is made of any fraud or collusion between Mr. Duval and M'David, and the propriety of the charge itself is not so absolutely disproved as to fix upon Mr. Duval an imputation of gross and culpable negligence, and he actually paid the money, I cannot say that the jury were wrong in allowing it. Why should Mr. Duval have paid this money to M'David if he did not think it honestly due to him? He knew he took the hazard on himself of its being allowed to him or not in the settlement of his account. To the general remark I have made on the first reason, which relates to the loss of a horse, I will add that the witness said he knew the horse died in the service which brought the charge within Mr. Stewart's rule of allowance: but I told the jury that if they thought the horse died in consequence or by reason of the service, the charge should be allowed, but not if the loss was owing to the fault or negligence of the owner, even if the horse was in the service at the time.

As to the three hundred dollars paid to Pierre Perra as an interpreter at Washington, which is the subject of the second reason for a new trial, I am free to say that I should not have allowed it, and I gave my reasons for this opinion to the jury; but they have thought otherwise, and I cannot say that they had not a right to do so. It was, in my mind, a strong circumstance against this charge, that the money was not paid by Mr. Duval to Perra, nor, as far as I recollect the evidence, ever demanded of him by Perra. It was paid since the death of Mr. Duval, one may almost say gratuitously by his administrator, and three years after the service was performed for which it was demanded. The service was in 1828, the payment in June, 1831. Such things certainly cast a shade over the charge, but the jury have been satisfied that it is correct, and their decision upon it must stand.

The two items, on which I have not been able to find a satisfactory support for the verdict, are the third and fourth. The fourth has not been argued on this motion, because it is understood that the defendants will consent to correct the ver-

dict by adding to it the amount of this item, to wit, two hundred and seventy dollars and thirty-five cents. It arose on a claim made by Mr. Duval for disbursements for improvements on the property called the "Cherokee Reservation," before its sale. Such a charge upon the United States for disbursements on property not belonging to them, but of which both the title and possession were in the Cherokees, was directly contrary to every principle of law, charging one party for improvements on the property of another. Nor did Mr. Duval himself ever consider this an expenditure chargeable to the United States, or introduce it into any account against them. The charge was to the "Cherokee Reservation." Mr. Murray, the defendants' witness, who was the confidential clerk of Mr. Duval, and from whom we have derived all our knowledge of the transactions of his agency, says expressly, that he believes Mr. Duval considered the Cherokee nation as responsible to him for these improvements; that he considered the whole matter to be between the Cherokees and himself, and not with the government. This allowance of this charge against the government, is as much against the evidence as the law of the case. As the counsel for the defendants have given up this part of the verdict on my suggestion, at the argument, I owe it to them to explain more fully the reasons of my opinion. By the treaty of the 6th of May, 1828, the Cherokee Indians made a cession of territory to the United States, with a special reservation of a certain part of it. In relation to this it was stipulated that the part reserved, with all the improvements on it, should be sold by the United States, and the proceeds of the sale be applied to the benefit of the Indians on the new territory to which they removed. The sale was made. Mr. Duval was the purchaser at the price of two thousand and fifty dollars; this he paid to the United States, and they appropriated it, according to their agreement, for the benefit of the Indians on their new territory. This sum, so received and so applied by the United States, was the whole proceeds of the sale as well of the lands included in the reservation as of all

the improvements made thereon, for which improvements the sum of two hundred and seventy dollars and thirty-five cents, now claimed by the defendants, was expended by Mr. Duval, while the land belonged to the Indians, at their request and on their credit and responsibility. It is now contended, or was so at the trial of this cause, that the United States must not only pay to the Indians the proceeds of their land and improvements, but must further pay a debt they owe to Mr. Duval on account of those improvements, that is, in fact they are to pay twice for them, once by handing to the Indians the whole amount they brought at a public sale, and now again by paying for them to the person at whose cost they were made. When Mr. Duval made these improvements he did so on the credit of the Cherokees, and had no idea of having any claim on the United States for them.

When Mr. Duval made the purchase of this reservation he was the agent of the United States to these Indians. It was, since his death, on a suggestion of the illegality or impropriety of his being a purchaser at this sale, surrendered by his representatives to the United States, and they received back the money he had paid for it. Does the agreement with the United States to cancel this purchase, and the transfer of his right to the United States raise an equity to support this claim, because the land and the improvements thereby became the property of the United States? I can see nothing in this arrangement which raises an equity against the United States for the charge in question. If the purchase made by Mr. Duval was illegal by reason of his agency, his representatives gave up nothing when they cancelled it, and made the transfer to the United States. If, on the other hand, the purchase was legal and their right to the land complete, the surrender of it was a voluntary act, made freely and without condition, or any intimation of receiving any thing more from the United States than a return of the money Mr. Duval had paid for it, which, it may be, was better for them than the land. If it was the intention of the representatives to claim any more, either directly or as a credit in their

account with the government, they should have said so, and the United States, the other party to the bargain, could have said whether they would assent to it or not. The only consideration that appears in the agreement, the only one that was recognised by both of the parties, or even thought of, as far as we know, by either of them, was the repayment of the sum of two thousand and fifty dollars, which Mr. Duval had given for the land. If an individual, instead of the government, had made this agreement with Mr. Duval, and had paid him the stipulated consideration, could he have been afterwards charged with an old debt which the Cherokees owed to Mr. Duval, for the same improvements on the land which were paid for in the sum of two thousand and fifty dollars, given for the whole? I told the jury that I was very clear that this item ought not to be allowed, on any principle of law or equity, and it is as clearly against the evidence.

The matter alleged for a new trial, in the third reason, requires a fuller explanation of the evidence which relates to it. It is thus stated: "Because the jury allowed the claim of the defendants for four hundred and sixty-six dollars and sixty-four cents for forage of horses of the said Edward W. Duval for four years and upwards, although the defendants were not entitled by law to such allowance; although there was evidence that the said Edward W. Duval never claimed the same in his lifetime; and although the court charged the jury unfavourably to such allowance."

The charge or credit, claimed by the defendant in this item, is for foraging two horses from the 1st January, 1826, to 31st August, 1830. In the examination of Mr. Murray, the witness of the defendants, to support this charge, he says, that these horses were employed in the service of the United States, and were necessary for it. He thinks the charges are moderate. They were Mr. Duval's horses; he had his farm horses besides; these were kept for public service, such as travelling through the nation, and to send expresses. He says, he knows of no such allowance to other agents. Mr. Duval had not the same

horses all the time. He knows of no authority from the secretary of war to Mr. Duval to keep these horses.

On this evidence, given by the defendants to support this claim, these observations present themselves: 1. That the charge is for a period of four years and eight months; during which period, nor, indeed, at any time in the lifetime of Mr. Duval, was any charge for keeping these horses introduced by him into his accounts sent to or settled with the department, nor any claim made for it in any way by Mr. Duval. This circumstance affords some ground, I might say strong ground, to presume that he never considered it a charge which he had a right to make, or intended to make, against the government, and it stands, in this respect, on a similar footing with the charge for the improvements on the Cherokee reservation. 2. If these horses were really kept for the public service, and were necessary for it, and were so thought and intended by Mr. Duval, the cost or purchase of them would have been, at least, as fair a charge upon the government as their forage; but they were Mr. Duval's horses, bought with his private funds, and no reimbursement of their price was ever asked by Mr. Duval, or is even now asked from the United States. This is another circumstance to show how this transaction has been understood by Mr. Duval himself. 3. The same horses were not kept through the whole period, but no account is raised with the United States for the sale or the loss of the horses he parted with, nor for the purchase of their substitutes. 4. This is a regular, continued charge for a long period, and not for horses required or employed, from time to time, in the public service, on emergencies which allowed no opportunity to consult the department at Washington, and obtain the permission of the secretary for the expenditure; nor do they appear to have been procured or wanted for any such emergencies, but to have been used for travelling through the nation or in sending expresses, in the performance of the ordinary duties of the agent.

Before we take up the evidence of Mr. Stewart and Col. M'Kenney on this subject, let us turn to the act of congress

which has a direct bearing upon it, and whose provisions, we must presume, were found to be necessary to prevent or restrain abuses upon the treasury, in the undefinable shape of extra allowances, which might grow out of these agencies without the means of detecting or checking them in detail. By the first section of the act of 20th April, 1818, the salaries of the several Indian agents are appointed; and by the third section it is enacted: "That the sums hereby allowed to Indian agents and factors shall be in full compensation for all their services; and that all rations, or other allowances made to them, shall be deducted from the sums hereby allowed." The legal rights or claims of an agent upon the United States are thus circumscribed by the law, but there exists in the war department a power to make allowances to an agent, unprovided for by law, when the secretary shall think them to be just and equitable, and not forbidden by any law. Under this power, certain usages have grown up in the department, which have become the law of the department, and on which an agent has a right to rely, in the exercise of his functions. That which has been uniformly allowed to others, he may presume will be allowed to him, and if he performs a service, or makes an expenditure of this description, he has a right to expect an allowance for it. The defendants have endeavoured to bring the charge we are now considering, within the protection of the usage of the war department. To effect this they have produced the testimony of William Stewart and Col. M'Kenney. Mr. Stewart has been a clerk in the war department from 1818 to 1832; he says it has been invariably the custom to allow salary officers extra for services not within the scope of their offices. He mentioned the case of Governor M'Minn, who received eight dollars a day and other allowances, as a commissioner to value the improvements of the Cherokees, and received at the same time his salary as governor. In this case it is evident that the appointment as a commissioner was entirely distinct from that of governor; the duties of the stations were wholly independent of each other. The service as

a commissioner was clearly not within the scope of his office of governor. It is no example or precedent in this case. So of the case of Col. M'Kenney. In 1827, this gentleman, then at the head of the Indian bureau of the war department, whose office and duties were at Washington, was sent by the government among the Indians to make treaties, and to reconcile some differences among the Creeks. He acted as a commissioner in forming a treaty, and received pay as a commissioner for the time he was treating, and his travelling expenses, and, at the same time, his salary as superintendent of the Indian bureau. This case is analogous to that of Governor McMinn, but not to the charge made on behalf of Mr. Duval. I am aware that this part of Mr. Stewart's testimony was applied more particularly to other charges in the defendant's account than to this; but as it may have some bearing on this also, I have made this reference to it. In relation to this item, to wit, the foraging the horses, this witness says, that no allowance was made for keeping horses, unless specially agreed upon by the secretary. If a horse is wanted for an emergency requiring prompt execution, as expresses, there is a discretionary power with the agent to employ one, but, in general, no allowance was made for horses, unless specially authorised. When this witness gives the example of expresses, he must be understood to mean an express on an emergency requiring prompt execution, and not an ordinary message sent on ordinary business.

In the case of Col. Crowell, given by this witness, the question was deliberately considered. He was the agent of the Creek Indians, and brought a charge of two hundred and fifty dollars a year for horses, for the use of the agency, for four or five years. It was allowed by the then acting secretary of war. This was in 1828. He was also allowed for the cost or purchase of the horses. Thus he carried the whole thing through as the concern of the government, charging them for keeping what he alleged to be their horses, bought and kept for the use of the agency; and not, as in this case, for keeping

horses admitted to be his own. The comptroller, in settling Col. Crowell's account, refused to pass this charge; and so it remained suspended, until it was finally, within the last eighteen months, rejected by the secretary of war. This seems to have settled the practice or usage of the department, or to have been in conformity with it, for, the witness says, several agents brought in similar claims, but they were all rejected. What this witness says about allowances being sometimes made on honour, on the character of the officer, clearly relates to a deficiency in the vouchers, and not to the admissibility of the charge. The whole bearing of this testimony is opposed to the credit claimed for Mr. Duval. He had no special authority from the secretary for the purchase or keeping of these horses; no evidence has been given to show that they were procured or kept or employed for any emergency in the public service so sudden and pressing that no application could be made for them to the secretary, consistent with the service. On the contrary, they were kept for nearly five years, not only without any request to, or permission from the secretary to warrant it, but without any intimation to him that such horses were in the employment of the government, or in the possession of their agent.

The testimony of Col. M'Kenney does not change this aspect of the case. He says, that an agent in the Indian country was not obliged to conform in all respects to the voucher system, and he gives a good reason for it. In speaking of the discretionary power, which, Col. M'Kenney believes, was vested in an agent, he explains himself by putting a case of emergency in which it would be impossible to get the instructions of the government; and he says, "under such circumstances it was expected of him to exercise a sound discretion, and to move in the case." He would then be allowed in his account "a reasonable expenditure in such an enterprise." This, the witness says, applies to any extraordinary occurrence within or without the agency, as if horses or canoes are wanted, they are allowed for. He says, the agent has to pay Indian annuities in specie;

that horses are wanted to transport it; and adds, that a horse, sometimes two, is allowed for the use of the agent in his own personal intercourse with the different divisions of his agency; that two horses were generally considered to be a reasonable allowance for an agent; the horses to be bought by the government, and to be their property. This general allegation of such an allowance was qualified by the witness, in his answer to a question of the court, in which he said, an agent would not be allowed for keeping horses, unless it was specially allowed by the secretary of war, by which I understand that, when he said before that "two horses were generally considered to be a reasonable allowance for an agent," he meant that the allowance must be first obtained from the secretary, except in cases of emergency, and not that the agent might procure and keep the horses at his discretion, and afterwards make them a charge, as a matter of right, against the government.

I have looked through the evidence, in vain, for something by which I could, judicially, support the verdict of the jury in this particular. The charge of the court was very explicit against it, and, on a careful review of the case, I see no reason to change the opinion I had at the trial. By admitting this charge, we should introduce a new rule and principle in the settlement of the accounts of Indian agents, which may be very extensive and mischievous in its consequences. If the defendants had a right to this credit, I should not regard its disallowance by the accounting officers of the government, who necessarily transact their business by established rules, which cannot always conform to the right and justice of every case; but these defendants have tried to justify this charge, not by any positive law or legal right, but in the equity of an alleged usage of the department of war, when it is clear no usage exists there to countenance the claim.

After the delivery of the above opinion, the defendants' counsel appeared in open court, and agreed that judgment be entered for the United States of America, for one thousand and eighty-

five dollars and twenty-eight cents, in conformity with the opinion of the court.

JUDGMENT accordingly for the United States of America, for one thousand and eighty-five dollars and twenty-eight cents.

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## ANDREW ARMSTRONG
## *v.*
## THE UNITED STATES OF AMERICA.

1. A warrant of distress, under the provisions of the act of 15th May, 1820, has the effect of a judgment.
2. The bill of complaint of a debtor, against whom a warrant of distress has been issued, under the provisions of the act of 15th May, 1820, is in the nature of a motion to stay execution on a judgment, and the beginning and conclusion of the argument are with the debtor.
3. A permanent agent is one appointed by the President, with the advice and consent of the senate, in contradistinction to one specially appointed by the head of a department, for some particular service, and on terms agreed upon.
4. A permanent agent commissioned under the act of 3d March, 1809, is entitled to no more than a commission of one per cent. on the moneys disbursed by him for the use of the United States, and also on the value of stores furnished by the United States, and distributed though not purchased by him.
5. In the act of 3d March, 1809, there is no distinction between foreign and domestic agents, as to either the mode of appointment, the tenure and permanency of their offices, or the terms on which they may receive them.
6. A navy agent stationed abroad, who has been removed, or whose office has been vacated, cannot charge the government with his return home, nor with his travelling expenses in going to the seat of government to settle his accounts.
7. Where an article is furnished by a navy agent, and expressly received and accepted by the United States for the public use, he is entitled to a credit for its value, although the article is not one which an agent is authorised to purchase on public account.
8. Where a bill of exchange, properly drawn by an authorised agent on the head of a department, is permitted by him to be protested for non-acceptance and

non-payment, under a mistake of a fact concerning it, the agent is entitled to a credit for the damages paid by him in consequence of the protest.

On the 30th July, 1832, the solicitor of the treasury, according to the provisions of the second and third sections of the act of 15th May, 1820, issued a warrant of distress against the complainant Andrew Armstrong and his surety, directed to the marshal of the Eastern District of Pennsylvania, specifying the sum of twelve thousand nine hundred and forty-nine dollars and sixty-three cents, as the amount with which the said Andrew Armstrong was chargeable, for public moneys received by him and not paid over according to law. 3 Story's Laws, 1791.

On the 1st August, the marshal, in pursuance of this warrant, made a levy on the person of Mr. Armstrong and on the goods and chattels of his surety.

On the 3d August, the complainant, alleging that he was aggrieved by these summary proceedings, and not only denying that he was chargeable with the amount stated in the warrant, but claiming the sum of four thousand six hundred and eighty-one dollars and seventy-four cents, as actually due to him from the United States, over and above all moneys received, preferred a bill of complaint to the district judge of the United States for this district, setting forth the injury thus done to him, and praying the judge to grant an injunction to stay proceedings on the warrant altogether.

On the same day, the judge being satisfied that the application was not merely for the purpose of delay, and the complainant having given bond, with approved surety, conditioned for the performance of such judgment as should be ultimately awarded against him, an injunction was granted to stay proceedings on the warrant of distress; and a subpœna issued to the solicitor of the treasury to appear and answer on behalf of the United States.

On the 5th October, the attorney of the United States for this district filed an answer on their behalf, as well in regard

to the matters of fact stated by the complainant, as to his claims alleged to be derived under certain acts of congress and established usages of the government.

On the 12th October, he further prayed the court to dissolve the injunction altogether, and to permit the United States to pursue their legal remedies for the recovery of the whole sum of money demanded by them from the complainant.

On these pleadings the case came to be heard before the District Court, on the 24th June, 1833, when the material facts established were as follows:

Andrew Armstrong was appointed by the president, by and with the advice and consent of the senate, navy agent for the port of Lima, in Peru, in South America. His commission was dated on the 24th April, 1828, and was to continue in force during the term of four years from that day. From a conversation shortly afterwards with Mr. Charles Hay, at the time chief clerk of the navy department, he derived the belief that all navy agents, at foreign ports, were allowed the customary commercial commissions of their respective stations, as had been especially done in the cases of Michael Hogan, navy agent at Valparaiso, and Richard M'Call, navy agent to supply the Mediterranean squadron. On the 16th January, 1829, he received written instructions from the secretary of the navy, relative to the duties of his office, instructing him to supply the necessary stores and to draw on the department for the requisite funds; he was also directed to furnish accounts and vouchers regularly on the first days of January, April, July, and October, and referred to the act of congress of the 3d March, 1809, as that by which he was to be governed in the keeping and settlement of his accounts. He left the United States, and commenced the duties of his office at Lima, on the 1st July, 1829; and continued to exercise them until superseded in the following year. On the 5th April, 1830, the secretary of the navy informed him by letter, that the president had revoked his commission, it being considered more for the benefit of the public service, that the duties of a navy agent

on that coast, should be performed by a purser specially appointed for the purpose. This letter reached Mr. Armstrong at Lima, on the 20th October; and he was informed also that his successor was Mr. Philo White. Commodore Thompson, then commanding the squadron on the station, requested Mr. Armstrong to continue to perform the duties of the office until the arrival of Mr. White, which he did up to the 1st June, 1831, when that person received from him all the stores in his possession. He continued, however, to reside at Lima until the 20th January, 1832, when he went to Valparaiso; there he embarked on the 9th March, and arrived in the United States in the month of June following. He repaired to Washington and exhibited his accounts, claiming a balance to be due to him from the United States, of four thousand six hundred and eighty-one dollars and seventy-four cents. In his account, as settled by the accounting officers of the treasury, on the 14th July, they certified, on the contrary, a balance of twelve thousand nine hundred and forty-nine dollars and sixty-three cents to be due by him. This difference, amounting altogether to seventeen thousand six hundred and thirty-one dollars and thirty-seven cents, constitutes the subject of the present controversy. It consists of the following charges, made by Mr. Armstrong, which were rejected by the accounting officers of the treasury. 1. The sum of five thousand seven hundred and fifty-five dollars and eighty-six cents, and also of four dollars, being four per cent. commission on all the disbursements made by Mr. Armstrong; one per cent. was allowed him according to the act of 3d March, 1809, but he claimed five per cent. as "the customary commercial commission of the station." 2. The sum of ten hundred and forty-three dollars and ninety-nine cents, being five per cent. on the value of the stores distributed by him, and claimed on the same ground. 3. The sum of one hundred and eighty-three dollars and twenty-four cents, five per cent. on the value of the stores delivered over by him to his successor in office, Mr. Philo White, claimed on the same ground. 4. The sum of two hundred and sixty-eight

dollars and seventy-five cents, charged for the hire of a clerk, over and above the sum allowed by the department, and claimed on the ground that it had actually been paid in the necessary service of the United States. 5. The sum of eight hundred and sixty-three dollars and thirty-three cents, for damages paid on a bill drawn by Mr. Armstrong on the secretary of the treasury, but protested by him, and claimed on the ground that the bill was properly drawn, while the refusal to accept it arose from a mistake made by the officers of the United States, without any fault of his. 6. The sums of sixteen hundred and nine dollars and eighty-seven cents, and three thousand two hundred and twenty-nine dollars and fifteen cents, making together, four thousand eight hundred and thirty-nine dollars and two cents, for board and compensation, from the time he was superseded until he left Lima, claimed on the ground that he was detained on account of the protest of his bill, and also to fulfil the duties of the office until his successor arrived. 7. The sums of three hundred and fifty dollars, and forty-three dollars and fifty cents, making together three hundred and ninety-three dollars and fifty cents, for the cost of his passage to the United States and his journey to Washington, claimed on the ground of his sudden and unexpected recall, without the least alleged misconduct on his part. 8. The sum of four thousand two hundred and seventy-nine dollars and sixy-eight cents for tobacco furnished and actually delivered by him to the agent of the United States, for the use of the squadron.

At the outset, a question arose between counsel, as to which party belonged the right to commence and conclude the argument. It was claimed by the attorney of the United States, on the ground that this stage of the proceeding was, in fact, the trial of the issue between the United States and the debtor, the ascertainment of the sum due, in which the affirmative rested with them, while the debtor was to disprove their claim in whole or in part. The counsel for the complainant contended that this was, by the very terms of the law, a prayer for relief

by him; that he was to show the injury he had sustained; and that he was exactly in the situation of a party against whom a judgment exists, making application to a court to open it and set it aside in whole or in part.

On this preliminary point Judge HOPKINSON delivered the following opinion:

The right to begin and conclude is with the complainant. By the act of congress of 15th May, 1820, on the certificate of a balance due being given by the comptroller of the treasury, the United States may issue their warrant of distress, which is, in fact, an execution and levy for the amount certified on the person, goods, and lands of the debtor. It has then all the effect of a judgment, and the party indebted must get rid of it, by showing that none or a portion only of the sum is due. When a motion is made to stay proceedings or an execution, on a judgment entered, and to let the party into a defence, the beginning and conclusion are with the defendant. The District Attorney has nothing to show but his warrant of distress, which is primâ facie evidence of the debt, and is already in possession of the court, being in the hands of its officer. The question before the court relates only to the continuance or removal of this warrant; not to the final settlement of the debt or balance between the parties. It is incumbent on the complainant to show that there are sufficient grounds for its removal in whole or in part. In this he is the actor.

The case was then argued by DALLAS and J. R. INGERSOLL for the complainant, and GILPIN, District Attorney, for the United States.

DALLAS, for the complainant.

Mr. Armstrong was commissioned by the president, as a navy agent, from the 24th April, 1828, for a period of four years, but his appointment was revoked, and he received notice of it on the 20th October, 1830. In settling his accounts after his return

home, a difference arose between him and the treasury; as to the items and amount of this difference there is no dispute; it is only as to the legality or equity of his claims.

The first ground taken against him is, that he is entitled but to one per cent. on his disbursements, instead of five per cent. the customary commercial commission at Lima. It is assumed at the outset that he was appointed "a permanent navy agent" under the act of 3d March, 1809, which limits his compensation to one per cent. on the public moneys disbursed by him. He was not, however, appointed under that law, nor is he subject to its provisions. He was appointed "a foreign and special agent," and as such was entitled to charge and receive the customary commission of five per cent. 1. As to the first position, that he was not appointed under the act of 1809. There are two sorts of navy agencies known to the laws of the United States, which vary substantially; those at Gibraltar, Valparaiso, London, Marseilles, and St. Thomas are confessedly different from those at Philadelphia, New York, and elsewhere in the United States. This difference arises not from any diversity in the mode of appointment; it may be in any case, whether at home or abroad, either by commission or special authority. Nor does it arise from the circumstances of one being, and the other not being, expressly established by law; the establishment of both or neither may be by law; it is well known that there are various modes of constituting officers who are not expressly appointed by a particular statute, but who are recognised by the government and by the courts as equally legal, and who are bound to perform their duties, and entitled to their compensation; there is, in fact, no law whatever, establishing any navy agencies, permanent or special, foreign or domestic. Nor does it arise from any difference in the duration of the office; in this case a distinction has been set up between such as are permanent and such as are temporary, but both are equally dependent on the discretion of the executive; we here see the navy agency of Mr. Armstrong, at Lima, called permanent, which expired in fifteen months; and that of Mr. M'Call, at Gibraltar,

called temporary or special, which lasted for fifteen years. No. The real difference arises out of the nature of things. One class is foreign and the other domestic; Lima is like Gibraltar, and the act of 1809 can apply neither to one nor the other; it evidently refers only to a domestic agent, it requires him to keep the public money in some incorporated bank, it obliges him to settle his accounts monthly, things which are absurd in regard to a foreign agent. Nor did the secretary of the navy think so, for he revokes the appointment; he does not remove the incumbent; he abolishes the office instead of changing the officer; had the office been created by the act of 1809 he would have had no authority to do so. 2. If then Mr. Armstrong was not appointed under this act, his compensation does not depend on it; it is not limited to one per cent. but he is entitled to customary commercial commissions. This court has the power to decide on principles of equity and ought to do so. There should not be one rule for individuals and another for the government; if there were nothing to bind it to a uniform rule it would be just and equitable. But the government has itself fixed such a rule; Mr. Hay, a principal officer of the department, gave Mr. Armstrong reason to believe so when he accepted the office. Mr. Hogan's compensation at a port on the same coast with Lima was five per cent. Mr. M'Call was allowed two per cent. on the immense disbursements made by him in the Mediterranean. Mr. Hayne at Marseilles, and Mr. White, afterwards in the Pacific, received large and liberal commissions.

The refusal to allow Mr. Armstrong five per cent. on the value of the stores distributed by him, and delivered over to his successor, rests on the same assumption, that being appointed under the act of 1809, his sole compensation is "one per cent. on the public moneys disbursed." It is of course met by the argument heretofore offered, but in regard to these items it presents the additional hardship, that it actually deprives the agent of all compensation for the largest and most responsible branch of his duty, the distribution of stores. It proves also conclu-

sively that this act applies only to domestic navy agents, for they do not distribute the stores, that duty being intrusted to the naval storekeepers, officers appointed in all the domestic agencies for that purpose, but not known in the foreign agencies.

The claims by Mr. Armstrong for the repayment of the clerk hire and the damages on a protested bill, seem to be too just to admit of discussion. He was authorised to employ a clerk, and he has proved that he paid him the amount claimed; if the sum of one thousand dollars was the limit fixed by the department, that was not known to the complainant, and, had it been, could not be complied with; he did a thing which was permitted, and is entitled to be paid what it cost him. So as to the bill of exchange; he was expressly authorised to draw it by his original letter of instruction; it was drawn before he received any notice that he was superseded; and as the refusal of the government was founded on a belief that this was not the case, which belief proved to be erroneous, they must bear the cost of the mistake.

The payment of Mr. Armstrong's expenses and compensation while detained at Lima, and the cost of his return and visit to Washington, is a demand properly addressed to the equitable consideration of the court. He was five thousand miles from home, holding an office which he expected to retain for four years at least, and had incurred expenses under that impression. No complaint was made or fault found; not only this, but his bills rightfully drawn were protested; he was obliged to remain in order to meet them, and also to perform the duties of his office, at the express request of the commander of the squadron, until his successor arrived. Under such circumstances, if no indemnity be given, he should at least be protected from loss. His return home was, as it were, compulsory, made suddenly, and without his means being prepared. It was necessary too, in order to settle his accounts; in the naval service an allowance would be made to an officer brought back under such circumstances.

The refusal to allow the remaining claim for the value of the

tobacco furnished by Mr. Armstrong, seems to have arisen from some vague notion of his having acted improperly about it. The evidence does not confirm this. It is true he formerly owned the tobacco himself, but he has proved a bona fide sale of it to a Mr. M'Culloch; and when he repurchased it, he had the positive instructions of the commander of the squadron. He is actually allowed a credit for a small part of it, which was used by the vessels of the United States. He delivered all of it to their agent, by whom it is still retained, and he is surely entitled to be paid for that which they keep from him, as well as that which their sailors actually consume. 2 Story's Laws, 1123. The United States v. Macdaniel, 7 Peters, 16.

Gilpin, for the United States.

On the 24th April, 1828, the complainant was appointed an officer of the United States; the appointment was made as the constitution directs, by the president, by and with the advice and consent of the senate; he received a commission under the seal of the United States; that commission designates him as "navy agent at Lima, in Peru." This, then, is his office, expressly designated; he is a navy agent; he is to perform the duties and receive the compensation of such an officer. He does perform the duties until the 1st October, 1830. In presenting his claim for compensation, he demands certain allowances which are refused by the accounting officers of the treasury, because a navy agent is not entitled to them. He appeals to this court to reverse that decision.

The first and preliminary question is, whether or not the law has recognised the office of a navy agent, described its duties, and fixed its compensation?

By the first law relating to supplies for the navy, passed on the 7th August, 1789, the secretary of war was directed to purchase stores for the navy as well as the army, but no arrangement was made for subordinate officers. On the 23d February, 1795, the office of purveyor of public supplies was established, with a salary of two thousand dollars, for the purchase of all naval and military stores; and on the 16th July, 1798, the navy

department having been in the meanwhile organised, that officer was placed under the orders of the secretary. By the same law, all 'agents' for supplies for the navy were required to settle their accounts with the accountant of the navy; and in the appropriation law of 1807, there is an allowance for their commissions. During the whole of this period they were thus mere subordinate agents, under the purveyor of supplies, holding no commissions, and not being officers appointed by law. This system being found very inconvenient, a law was passed on the 3d March, 1809, directing that all permanent agents for purchasing supplies or disbursing money for the navy, should be appointed by the president and senate, receive a compensation not exceeding that of the purveyor of supplies, which was two thousand dollars a year, and give bond; the compensation to be derived from "a commission of one per cent. on the public moneys disbursed by them." This established the present system of navy agencies, and led to the abolition of the office of purveyor of supplies soon after. On the 15th May, 1820, a law was passed declaring that "navy agents shall be appointed for the term of four years, but shall be removable from office at pleasure."

Such was the law relative to navy agents when the complainant became a public officer; he was appointed, commissioned, and gave bond in the usual mode; he performed the usual duties; he has received the authorised compensation of one per cent. on his disbursements. He claims, however, the large additional sum of seventeen thousand six hundred and thirty-one dollars and thirty-seven cents, under various pretexts.

1. He asks to be allowed four per cent. additional on his disbursements. To sustain this he must show either a law, contract, or usage. He can produce no law authorising it, for none exists. The contract he alleges is a conversation with Mr. Hay, chief clerk of the navy department; if that officer had made a contract, it would not have bound the United States, especially when a law fixed the compensation; but in fact, it was altogether too vague to be regarded even as an understanding. What

is meant by customary commercial commissions? They vary under a thousand circumstances; in this very case it is proved that M'Call got two per cent. and Hogan five; there is no date given, but this conversation is said to have been "about the time of his appointment;" long afterwards the secretary writes him formally, instructs him at large; would he have omitted so important a contract, varying as it did from the law? Besides, he is directed to govern himself by this law in keeping and rendering his accounts: was it meant he should so totally deviate from it in charging compensation? It is impossible to establish a contract between the United States and the complainant on such grounds as these, especially a contract directly in the face of an existing law, to which he was explicitly referred. But he says he is entitled to this additional compensation by the usage of the department. To prove such usage he must produce a similar allowance in a similar case. He cites those of M'Call, Hogan, Hayne and White. They all differ materially; each was a special agent of the navy department, acting under a written contract with the secretary, and performing services specially designated; neither of them was appointed by the president, or commissioned; their compensation and duties varied according to a previous written agreement; it is no ground of similarity of office that both were in a foreign country, unless their appointments were similar; navy agents may be appointed at home or abroad; special agreements may be made by the department with persons at home or abroad; it is identity in the mode of appointment or terms of agreement that establishes a right to equal compensation, and any such identity the complainant has entirely failed to establish. If, therefore, he can show neither usage, contract nor law which gives him a different compensation from that allowed him by the act of 1809, his claim has been justly refused.

2. He asks five per cent. on the stores he distributed. The law does not allow it; his compensation is confined to the commission on money disbursed. But would it be just? There is no difference between the moneys disbursed and the value of

the stores distributed; he disburses the money he has received from government in buying these stores; he receives his commission on it; and to receive it again on the distribution would be to charge a double commission on the same funds.

3. He asks five per cent. on the stores delivered to his successor. This is not allowed by law; nor is it just, since, as in the case of those distributed, he has already received his commission on their purchase.

4. He asks for clerk hire beyond a liberal allowance already made. The only ground for such a claim at all is the usage of the department, and the sum that recognises has been already paid him.

5. He asks for the return of damages on his protested bill. He had a large amount of funds on hand when he drew it; besides his own commissions, he had twelve thousand dollars at least of public money. In every case where such payments have been allowed, it is where the government have been mistaken in supposing the agent had funds; to allow him to draw ad libitum would be the height of indiscretion; and if he does so when he was not in want of the money, he must suffer the loss.

6. His demands for compensation at Lima and on his passage home, are entirely without law or precedent; he was not an officer of the United States during the time he asks for it; he was a private merchant, and remained there at his own pleasure; he produces neither law, agreement nor precedent to sustain it: where such allowances are granted it is by express law, as in the case of foreign ministers, or when an officer is ordered home, as sometimes in the navy; he could not have waited on account of the protest of his bill, since that was not to be anticipated; and if it was, his claim to damages would have been equally good without such delay; he could not have believed that a mere request, by the commander of the squadron, to perform an occasional service, would entitle him to the emoluments of an office in which he was formally superseded.

7. His claim to be paid for the tobacco has been allowed, for

all that he actually furnished, but he has no right to ask payment for all he chose to purchase; it is proved that he bought it for himself, not for the United States; he had no right to buy it for the United States, because by express regulation it was not an article included in the stores to be supplied by the navy agents; an order from the commander of the squadron to him, to do what was forbidden by the department, offered him no excuse; and finally he never did transfer it to the United States, since their officers refuse to receive it.

The complainant having thus failed to establish his claims for additional compensation, must limit himself to that allowed by law; this amount he has already received; consequently he is authorised to make no deduction from the balance of public moneys still in his hands; but the United States have a right to the removal of this injunction altogether, that they may proceed to recover their money in the usual course of law.

J. R. Ingersoll, for the complainant, in reply.

Mr. Armstrong received an appointment important to the public; he discharged its duties faithfully; he abandoned his own concerns; he returned to the United States when all was over; and what was his pecuniary account at last? The sum which has been proved to be the usual cost of living, added to the expenses of his passage, exceeds by nearly three thousand dollars, the amount allowed him by the accounting officers of the treasury. This may be said to be his ill fortune; yet surely it must infuse a spirit of equity into his case.

The difference between him and the United States is seventeen thousand six hundred and thirty-one dollars and thirty-seven cents. Of this, the largest and most interesting item, is the charge for commissions, whether on disbursements of money, or distribution and delivery of stores; these are identified in their principal features, in none are they essentially different; the grounds taken are applicable to them all. That the complainant has earned the legal compensation of his office or place is admitted; the quantum of that compensation only is disputed. It is perfectly clear the United States made no con-

tract with him, at the rate of one per cent; and if that only is due, it is on account of the express provision of the law. But on the other hand, there was an arrangement positively made, which might not indeed be a contract, for it wanted the formalities of one, yet was a complete understanding between the complainant and that officer of the United States who, in the absence or illness of the secretary of the navy, took his place; and this arrangement fixed the compensation as Mr. Armstrong asks it. When formal instructions were afterwards given to him, not a word was introduced to change it; on other points they were broad and full, as to this they left him where he had been already placed. The opinion he thus had a right to form, was strengthened by what he observed as to every one in a similar situation; he saw the allowances to the same officers at Barcelona, Marseilles, Valparaiso, and elsewhere abroad; he observed no resemblance between his duties and expenses, and those of navy agents at home, but every resemblance between himself and those abroad. The result of all this is therefore exactly the same, whether deduced from actual arrangement or the want of it; from what is usual in similar circumstances, or what ought to be expected in those which are entirely new; this result is, that, at the worst, there is an implied assumpsit, a quantum meruit, a compensation in proportion to his services. When exception is taken to so just a principle, it must be, it ought to be extremely clear. Is that so, which is now taken by the government? They found it on a difference, said to be created by the law of 1809, between permanent and special agents; but this does not help them, unless they can show which is one and which is the other. To do so, they produce a commission as the badge of distinction; for this, there is no reason except that it suits the present case; surely it does not make Mr. Armstrong's like a one per cent. agency, if unlike it in every other particular. The difference really is, that in the special agencies there are previous special agreements, previous special instructions; it was so in this case, in M'Call's, and in the others alluded to;

when, therefore, we are told that the law of 1809 forms the rule, we answer that Mr. Armstrong is not within the law, more than those persons were. When the law of 1809 created permanent agents, it created entirely new officers; no permanent navy agencies existed before; after this, these offices were created, places attached to the navy yards, and in their character, steady and durable; but certainly in doing this, it did not transform the duties arising from the transient visit of a squadron in a distant ocean into a permanent office. Nor can the mere granting a commission do so, as seems to be supposed, even if this be a commission which wants the attestation of the secretary of state, and which the president can, as he has done, summarily revoke. It has been attempted to meet this argument, by endeavouring to show that the agency of the complainant differed from those abroad, and resembled those at home; this attempt has failed in nearly every particular; in the nature of his duties, his powers, responsibilities, residence, and mode of settling his accounts, he is like the former not the latter. If then the United States have failed to show any agreement with him at the rate of one per cent., or any law limiting him to that sum, within which he can be fairly brought, he is entitled to the usual compensation for such services at Lima, and that is certainly as much as he has claimed. 1 Story's Laws, 49. Marbury v. Madison, 1 Cranch, 165.

His claims for clerk hire, for compensation during his detention at Lima, and for his expenses home, as well as for the repayment of damages on his protested bill, rest on grounds of incontrovertible equity. They were payments actually made by him, either for the United States or on account of requests or mistakes of their officers. It has been already seen that his aggregate expenditure very far exceeded what is allowed him; if it be shown that this excess arose from duties actually imposed upon him, it becomes highly unjust to refuse its payment.

The only remaining claim is that for the tobacco. Mr.

Armstrong was expressly ordered in his instructions to furnish supplies to the commander of the squadron, when they were called for; there was no limitation in this order, and the supply in question was made on the positive requisition of Commodore Thompson; it would have been his duty to do so, under his instructions, even had there been a regulation such as is supposed; but there is no proof whatever of any such, at least communicated or known to Mr. Armstrong. As to the allegation that it was a speculation of his own, it is sufficient to say that the property was wanted by the United States, examined and approved by their officers, paid for at a price which they deemed fair, and is now actually in their use and possession.

Judge Hopkinson delivered the following opinion:

On the 24th day of April, 1828, Andrew Armstrong, the complainant, was appointed, by the president, by and with the advice and consent of the senate of the United States, navy agent for the port of Lima, in Peru, in South America. The commission which testifies this appointment bears the date above mentioned, and declares that it is "to contiuue in force during the term of four years from the 24th of April, 1828." The letter of instructions given to Mr. Armstrong, from the navy department, is dated on the 16th January, 1829. By the act of congress passed on the 15th May, 1820, it was enacted that navy agents, with other officers mentioned in the act, "shall be appointed for the term of four years, but shall be removable from office at pleasure." In April, 1830, the president revoked the commission or appointment of the complainant, but the notice of the revocation, contained in a letter from the secretary of the navy of that date, did not reach the complainant until October following. He continued to reside at Lima until January, 1832, when he left it to return to the United States, going first to Valparaiso, from which port he sailed in March. On a settlement of his accounts with the government in July, 1832, a balance was struck against him of

twelve thousand nine hundred and forty-nine dollars and sixty-three cents, which, by a subsequent small credit, was reduced, in August, to the sum of twelve thousand eight hundred and seventy-five dollars and forty-four cents, now claimed by the United States. On the other hand, the complainant has presented an account or claim for credits against the United States, which, if allowed him, will not only absorb the whole demand upon him, but will turn the balance in his favour to the amount of four thousand six hundred and eighty-one dollars and seventy-four cents.

The United States, to enforce the payment of the amount they allege to be due to them from the complainant, proceeding under the directions of an act of congress passed on the 15th day of May, 1820, have issued a warrant of distress against the alleged delinquent officer and his sureties, directed to the marshal of this district, in which the said officer and his sureties reside. This warrant has been executed by the said marshal according to the provisions of the said act. By the fourth section of the act, "if any person shall consider himself aggrieved by any warrant issued under it, he may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge aforesaid may, if in his opinion the case requires it, grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires." Under this provision the complainant filed his bill of complaint, whereupon, he having complied with the requisitions of the act, an injunction was issued to stay proceedings on the warrant of distress. The District Attorney has filed a full answer to all the matters complained of in the bill, and the cause has been heard on this bill and answer, with the vouchers and other evidence produced by the parties respectively. The complainant complains of the rejection or refusal of certain credits in the settlement of his accounts with the government to which he alleges he is entitled in law or equity; and the District Attorney denies altogether

his right in law or equity to any of the allowances he claims, and prays that the injunction may be dissolved, so that the marshal of this district may proceed, under his warrant of distress, to levy and collect the said sum of twelve thousand eight hundred and seventy-five dollars and forty-four cents, remaining due from the complainant to the United States. It is now to be decided, so far as this court may decide it, whether the said injunction shall be continued altogether, or dissolved altogether, or in part; and, if the latter, for what amount it shall be dissolved, and the United States be permitted to proceed under their warrant of distress against the complainant and his sureties. To determine this question, it is necessary to examine every item of credit claimed by the bill and denied by the answer.

The first credit claimed by the complainant, which has been refused to him by the accounting officers of the United States, is a charge of five thousand seven hundred and fifty-five dollars and eighty-six cents, being for commissions on his disbursements of moneys as navy agent at Lima. On these disbursements an allowance has been made to him of one per cent., and the present claim is for an additional or further allowance of four per cent., making a commission of five per cent. in the whole. On the part of the government it is contended, that a navy agent of the United States, whether he reside abroad or at home, is entitled to no more than one per cent. on his disbursements of moneys, by the express enactment of the act of congress of 3d March, 1809. On the other hand the complainant avers, that he was not appointed under that act, and is not subject to its provisions nor bound by its restrictions, but is entitled to a compensation for his services according to their nature and extent, and the usual mercantile commissions for similar services at the same place, which were five per cent. The real question on this part of the case is, whether the complainant was appointed a navy agent under and subject to the act of congress of 3d March, 1809, or not; for, if he were so, that

act, after declaring the manner in which agents shall be appointed for the disbursements of moneys for the use of the navy of the United States, authorises the president to fix the number and compensations of such agents; "provided, that the compensation allowed to either shall not exceed one per centum on the public moneys disbursed by him." If, then, the complainant was a navy agent described by the said act; if he received his appointment and authority under and by virtue of it; he must be bound by all its provisions. The argument on this item has, therefore, been directed to this question.

The attorney for the United States has contended that the complainant was an officer of the United States, not the agent of a department; that he was a navy agent of and for the United States, appointed as such by the president and senate by virtue of the act of congress referred to; that previous to that act no appointments or commissions of such agents were ever given by the president, or by the president and senate, as this was, and as this act directs; that previous thereto, persons had been, from time to time, appointed by the secretary of the navy, at his pleasure, to perform certain prescribed duties for his department, under such contracts and arrangements as he chose to make with them; but that the appointment of the complainant was clearly not of this description, but was made or could have been made only under the act of 1809. The counsel for the complainant deny that he was an officer of the United States at all; they deny that he was appointed to the service he performed under the authority of the act in question; but that his services were performed for the navy department, in the same manner, by the same authority, and with the same rights of compensation as the agents that had been appointed by the secretary of the navy at other places. The cases of, and allowances made to, Messrs. Hogan, M'Call and others, have been much insisted on as forming precedents for this; and the distinction relied upon between such agencies as are, and such as are not, within the regulations of the law of 1809 is, that they

are to be applied only to those navy agents whose duties are to be performed in the United States; not to those who must reside in a foreign port.

After giving a close and careful attention to the arguments and illustrations of the counsel for the complainant, I cannot follow them to their conclusion. It appears to me to be entirely clear that the appointment of the complainant, as a navy agent at Lima, was an office of the United States, and not a mere limb of the navy department; that he was an officer of the United States deriving his authority from the constitutional appointing power, the president and senate; that their power to appoint navy agents was derived from the act of congress which created or established the office. Previous to the passage of the law of 1809, there were no such officers, either at home or abroad, properly so called, under the constitution of the United States. The constitution gives the power to the president to nominate, and, by and with the advice and consent of the senate, to appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. In conformity with this provision of the constitution, congress have established, by law, the office of navy agents, and the president, with the senate, has appointed the officer. Prior to this law the purchase of supplies and the disbursements of moneys for the use of the navy, were made, directly or indirectly, by the secretary or his agents; the state of the navy did not require a distinct office and officers for these purposes. These duties or services were performed by persons named for the occasion by the secretary, and, as I have said, they were his agents, his arms, and not officers of the government. They were neither appointed or removable by the president, any more than a clerk in the department; their agency began and ended with the pleasure of the secretary, or with the particular service for which they were employed. As our naval establishment was extended, and these services became numerous and important; as the operations of these

agents became of great magnitude, involving the expenditure of vast sums of money; it was wisely thought they should no longer be entrusted to the agents of a department, irresponsible in some degree directly to the government, and without any security beyond their own responsibility, for the faithful performance of their trust. The patronage, too, may well have been thought to be of too high a character and value to be attached to a department. The law of 1809 was intended to put these concerns under a better regulation. The third section enacts, "that exclusively of the purveyor of public supplies, paymasters of the army, pursers of the navy, military agents, and other officers already authorised by law, no other permanent agent shall be appointed, either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement, in any other manner, of moneys for the use of the military establishment, or of the navy of the United States, but such as shall be appointed by the president of the United States, with the advice and consent of the senate." It is then enacted that the president may fix the number and compensation of such agents, but with a limitation as to the latter, "provided that the compensation allowed to either shall not exceed one per centum on the public moneys disbursed by him." The fourth section requires a bond from the agent, with one or more sufficient sureties, for the faithful discharge of the trust reposed in him. All this appears to me to be very intelligible. We see no intimation of the distinction, essentially and necessarily relied upon by the counsel of the complainant, between foreign and domestic agents, in the mode of appointment, the tenure and permanence of their offices, or the terms on which they may receive them. The construction contended for, taking the foreign agents altogether out of the act, would not only deprive the president and senate of their appointment, but dispense, in their case, with the security to be given for the faithful discharge of the trust reposed in them, as well as of their limitation of the compensation to one per centum on their disbursements. As regards the bond or se-

curity, it would seem to me, to be infinitely more necessary in the case of a foreign than a home agent, who is always under the eye and control of the government, whereas the other carries on his operations in a distant country, and might be guilty of the grossest irregularities and frauds for a long time, before they would be known; and when known the delinquent would be out of the reach of the government with all his spoil. It has not been pretended that domestic agents are not subject to the provisions of this law, for this would be to repeal it wholly as to all navy agents, and I think it has not and cannot be shown, that any distinction is made by the law, or by the reason and design of the law, between the agents appointed for foreign or home stations. These are equally within or without the law; they are both clearly within it, in their appointments, their duties, their responsibilities, and their compensation.

It has been argued, with great earnestness, that this act has relation only to permanent agents, and that a navy agent abroad is not a permanent agent, for he is removable at the pleasure of the executive, and, in fact, in this case a removal was made in fifteen months, whereas the foreign agents appointed before the passage of this law continued undisturbed for many years. The first difficulty this argument has to encounter is, that it applies with the same force to the agents at home, who hold their offices in the same way, and may be removed by the same power that acts upon those abroad; and thus the distinction so carefully set up between foreign and domestic agents is overthrown. What is the meaning of a permanent agent as understood in the law? Certainly it does not designate the place of residence as affecting the description. Can we say that the complainant was not a permanent agent because he was removable, or because he was actually removed, by the president? Does the legal character or description of the appointment depend upon the exercise of the right of the president over the officer? This is clearly not the meaning of the law, as is apparent from the act of 15th May, 1820, which enacts, that 'navy agents,' with other enume-

rated officers, "shall be appointed for the term of four years, but shall be removeable from office at pleasure." The navy agents here referred to are certainly those which are appointed under the law of 1809 by the description of permanent agents. The phrase then 'permanent agents,' signifies those agents which shall be appointed by the president, with the advice and consent of the senate, in contra-distinction to those persons who had been or should be appointed by the secretary of the navy, on some special occasion or service, in his discretion and on such terms as he, on his official responsibility, should choose to arrange and make with the persons so appointed by him. The officer who takes his appointment from the president and senate, under the constitution and law of the United States, testified by his commission, which makes him independent of the secretary, and removable only in the manner and by the power given by the constitution and the law, may well be considered, legally, to be a permanent officer or agent of the United States. When the law declares that no permanent agent shall be appointed but by the president and senate, it, in effect, declares that the agent who is so appointed, is, within the meaning of the law, a permanent agent. The District Attorney is a permanent officer of the government, although removable at pleasure, and commissioned just as a navy agent is, in contra-distinction to a special or temporary attorney, who may be employed for a particular cause or service. The cases of Messrs. Hogan and M'Call have been frequently urged upon the court in the argument. It might be enough to answer that they clearly were not appointed under the law of 1809; but made their contracts with the secretary of the navy for the services they undertook to perform. They were not officers of the United States; they were not appointed as such officers must be. They did not derive their agencies, such as they were, from the president and senate, nor were they appointed under the authority of the act of congress. Contracts were made with them by the secretary of the navy under a discretionary power exercised by him. It is true that abuses may be practised in

this way; but they are not to be presumed. It is true that under the pretence of making a special agent, under a special contract, a navy agent may be placed in a foreign port by the secretary, with any rate of compensation he may agree to, and without the securities required by law from navy agents for the faithful discharge of their trust, and such an agency may be continued for many years, as has been done, performing all the duties of a permanent navy agent and no more. Such cases might be an evasion of the provisions of the law by the secretary; but they are always under the control of the president, who, by appointing a permanent agent, would supersede the special agency. The complainant in this case went abroad, not with any such special contract in his pocket, but with his commission as the only evidence of his appointment; the only source of his authority. This commission was given to him under the law of 1809; it could have been given to him under no other legal authority, and he took it as an appointment under that law, and subject to all its provisions. I am of opinion that he is entitled to no more than one per centum on the moneys disbursed by him for the use of the navy of the United States; and, of course, that he cannot be allowed the credit he now claims of an additional four per cent., amounting to the sum of five thousand seven hundred and fifty-five dollars and eighty-six cents. The one per cent. he has already received a credit for.

I have said nothing of the alleged conversation between the complainant and Mr. Hay, a clerk in the navy department. Our knowledge of it and of the time it occurred, is by no means satisfactory; but no such conversation, nor any opinion or representation of Mr. Hay, or any other officer of the government, can have any effect upon the provisions of the act of congress. If the complainant can show that he accepted his commission in consequence of these representations of Mr. Hay, he may have a case for the equity of congress; but we are bound to obey the law.

The next credit claimed by the defendant, and which has

been rejected by the accounting officers of the treasury, is a charge of commissions on the distribution of stores, amounting to six hundred and sixteen dollars and twenty-three cents. There is another claim on the same account of four hundred and twenty-seven dollars and seventy-six cents. They will be considered together. The act of 1809, which creates the office of a navy agent, has also fixed his compensation wholly or in part. We must recur to it for the decision of the question on the distribution of stores; obeying the directions of the law, where they are clear and explicit, and giving it a fair and reasonable construction where they are not so. It enacts, that the president may "fix the number and compensation of such agents; provided that the compensation to either shall not exceed one per cent. on the public moneys disbursed by him." There is, in my mind, something equivocal in this form of expression. Does it mean that the whole compensation of the agent, for all his services, shall not exceed one per cent. on the moneys he shall disburse; or that the compensation for or on account of his disbursement of moneys shall not exceed that rate. Perhaps the more strict and the more obvious construction of the words, as they stand in the law, would be that the whole compensation, for all the services of the agent, shall be one per cent. on the moneys disbursed by him. But it is not explicitly so said; and if we are permitted to resort to construction, as in a doubtful clause, it does not appear to be the most equitable interpretation of it. What is the difference in labour or responsibility, between distributing stores, and disbursing moneys for the use of the navy; unless we should say that the first is the more laborious and troublesome of the two. They are distinct services in every respect, and why should they be confounded in their compensation? If we look to the practice, under contracts made by the secretary with his agents, these subjects of service have been kept separate, and a commission charged and allowed for each. I must be understood to comprehend in this view only, such stores as were sent out by the government to the agent to be distributed by him to the navy,

and not those which have been purchased by him, and for which he has already received his compensation in a charge of commission on the moneys disbursed for the payment. The charge now made by the complainant is understood to be only for the stores furnished by the government. If we adopt a more rigorous construction of the law, and allow to an agent nothing but his commissions on the disbursements of money for all his services, a case of manifest injustice might occur. The location of an agent might be such, that it would be more convenient or economical for the government to send him every thing, or nearly so, that could be there wanted for the use of the navy; he would then have little or no money to disburse; while his labour in taking care of the stores and distributing them would be very great and unrewarded. By turning to the third section of the act, which creates this office, the duties of the officer, in the view of the legislature, and to which the stipulated compensation may be supposed to refer, are as follows: the "making of contracts, the purchase of supplies, and the disbursements of moneys for the use of the navy." No stores or supplies seem to have been contemplated by this law, but such as were purchased by the agent, and for which, of course, he had received his commission on the disbursements in making the purchase. But the distribution of stores or supplies not purchased by him, and for which service he has, in no shape, received any compensation, seems not to have been considered or distinctly provided for in the description of the duties to be performed by the agent, or in fixing his compensation for his services. Is the credit now claimed, such a one as the head of the department was authorised to allow, in the exercise of his equitable discretion in the settlement of the accounts of a public officer? Or is it so clearly prohibited by the act of 1809, that to allow it would be a violation of that law? In the latter case neither the secretary nor the court has any power over it; in the former, the court may do whatever the secretary might have done. We may give the credit, if we are satisfied to consider the service

for which it is claimed, as a casus omissus in the law, not provided for by it, and not within the restriction of compensation there imposed. In such a case we may consider the equity of the claim arising from the performance of a service, for which no remuneration has been made, and its allowance or disallowance would be subject to the discretion of the court under all the circumstances of the case. It is not a credit of positive right, for it is not promised by the act of congress, or by any contract with the government; and its allowance, as an equitable charge, will always depend upon the facts upon which the equity is founded. Such an equity may be found in one case and not in another; and each will be governed by its own circumstances. On this item, I have concluded, not without much doubting, to allow a commission of one per cent. on the value of the stores or supplies distributed by the complainant, and not purchased by him, but furnished by the United States. The credit claimed in his account, is five per cent. or ten hundred and forty-three dollars and ninety-nine cents; the allowance will be one fifth of that sum, or two hundred and eight dollars and eighty cents. As connected with this part of the case, I will dispose of the charge of one hundred and eighty-three dollars and twenty-four cents, commissions on stores and provisions delivered over by the complainant to his successor, Philo White. This charge is wholly inadmissible. It has none of the considerations in its favour which have influenced my decision on the last two items. The whole service was probably the delivery of a key to Mr. White. It was his duty to put his successor in possession of the public stores, and can afford no ground for a commission, on any principle of the most liberal equity.

A charge for clerk hire is not deemed, at the treasury, to be an improper credit to the complainant, and one thousand dollars have been allowed for that object. The balance two hundred and sixty-eight dollars and seventy-five cents, was rejected as an excess of what was thought to be a necessary or reasonable expenditure on this account. The complainant has exhibited

receipts showing that the whole amount claimed by him has been actually paid to his clerks. He asks only for reimbursement. It must be allowed, as there is no evidence of any bad faith or wanton extravagance in the expenditure.

The sum of eight hundred and sixty-three dollars and thirty-three cents, is claimed for damages and interest paid to Alsop & Co. on a bill drawn by the complainant on the secretary of treasury, on the 16th August, 1830, which was protested for non-acceptance and non-payment. The protest of this bill was permitted by the government under a mistake of the facts concerning it. The complainant, while legally acting as navy agent, had an unquestionable right to draw bills on the government; and many had been drawn and paid. The only reason for refusing this, was a suspicion or belief that it had been drawn after the complainant had notice of the revocation of his appointment, and, of course, after his right to draw had ceased. This was altogether a mistake. The letter of revocation was dated in April, 1830, but did not come to the knowledge of the complainant until October following, several weeks after the date of the bill, which was, therefore, rightfully drawn. When the truth of the transaction was known, the bill was paid; but the damages, which were paid by the complainant in consequence of the protest, by the mistake of the government, and for no fault in the complainant, have been withheld, and the loss thrown upon him. I cannot see on what principle of law or equity this has been done. In such a case, between a factor and his principal, can it be doubted that the factor would be entitled to a full reimbursement of such a payment. This credit must be given to the complainant.

The next two items will be considered together. They are so manifestly unsupported by the facts and reason of the case, that it is a subject of regret as well as surprise, that the complainant should have introduced them into his account. The first is a charge of sixteen hundred and nine dollars and eighty-seven cents, for his board during his detention in Lima, owing

to the protest of his bills, say from the day he ceased to be navy agent, the 1st of October, 1830, to the 20th of January, 1832, at three dollars and thirty-seven cents per diem. The second is a charge of three thousand two hundred and twenty-nine dollars and fifteen cents, for his compensation for the above time, at the rate of two thousand five hundred dollars per annum.

As to the detention at Lima, owing to the protest of his bill, if we could agree that the protest of this bill, drawn by him as an officer of the United States, and for the payment of which he was not responsible, could afford a reason for his remaining at Lima at the charge of the United States, it is not to be doubted, on the clear evidence of the case, that he did not remain there for any such reason, but for his own purposes, or at least, at his own pleasure. He remained at Lima, after notice of his removal from office, eight months before he knew of the protest of his bill, and during that time he had not any suspicion that it would be protested. Yet these eight months are a part of the period during which he alleges that he was detained at Lima, "owing to the protest of his bills." Again, he was informed of the payment of the bill in October, 1831, but his charge for detention runs on to the 20th of January, 1832, and he did not actually sail for the United States until March, 1832, either because he was attending to business of his own, or, it may be, waiting for a suitable conveyance. In the face of such facts I cannot admit that the protest of the bill had any thing to do with his remaining at Lima; and if it had, I do not see that the protest made such a necessity for his detention, as to raise a claim against the United States for it.

The claim of compensation, amounting to three thousand two hundred and twenty-nine dollars and fifteen cents, for services as navy agent, after the revocation of his appointment and during the alleged detention at Lima, is still more unreasonable. The claim is made for the time between the 1st of October, 1830, and the 20th of January, 1832. Now it is not

questioned that Philo White, the official successor of the complainant, arrived at Lima, took possession of the stores, and assumed all the duties of the appointment, in May, 1831; and yet, in the face of this fact, the complainant has made a charge as an acting navy agent, until January, 1832, full eight months after he had ceased to have any connection with the office, its duties, or services. It is true that when, in October, 1830, the revocation of the complainant's appointment came to Lima, he was requested by Commodore Thompson, to continue to act as agent, as his substitute had not arrived, in procuring supplies for the squadron, and taking charge of such stores as might be sent out for its use. We may presume that he did so. But what were the services he performed under this appointment or request of Commodore Thompson? Merely to procure supplies, and receive and distribute stores. For these he has been paid by his commissions on the moneys disbursed for the purchases, and on the stores distributed by him. I cannot but observe that in the same account, in which he has charged a commission of five per cent. for these services, he has also claimed a compensation for them, in the shape of a salary, at the rate of two thousand five hundred dollars a year.

I have felt a strong disposition to allow the credit of three hundred and fifty dollars paid by the complainant for his passage home. He left his country, and his business and prospects here, whatever they were, under an appointment by the government, which purported, by the terms of his commission, to continue for four years, and as much longer as the office and his services might be thought useful and acceptable. It is true he had no legal right even to this period of enjoyment, but he had a reasonable expectation of it, provided he gives no cause for a disappointment by his own conduct. No complaint seems to have been made of his ability or fidelity, and he had been but about fifteen months in the enjoyment of the place, when his appointment was revoked. Under such circumstances, we can see and feel that a strong moral equity arises, to bring him back to the place he was taken from. Between

individuals, a conscientious and just man would, I think, have done so. But no instance has been shown, under any such circumstances, of the recognition of a right, legal or legally equitable, in an officer who has been removed, or whose office has been vacated, to charge the government with his return home. I am afraid to set a precedent contrary to all usage, and must disallow this credit or charge. So with the complainant's travelling expenses in going to Washington to settle his accounts.

The only remaining item or charge in the complainant's account, is for the tobacco sold or furnished by him to the United States, amounting to four thousand two hundred and seventy-nine dollars and sixty-eight cents. I can have no hesitation in allowing it.

In the letter of the secretary of the navy, to the fourth auditor, of the 25th June, 1832, he says, the tobacco must depend on the fact whether the authority to purchase was revoked generally; and whether the revocation reached the Pacific station, before this purchase was made. If not it should be allowed; otherwise it should not. This is a very partial and imperfect view of the question; and it is probable that all the facts of the case were not known to the secretary. We have them now in evidence. The answer of the United States to the bill of the complainant does not deny or admit, that a report of this tobacco was made by the complainant, in his accounts, to the department, nor that it was surveyed by order of Commodore Thompson, as part of the public stores of the United States, and, as such delivered over by the complainant, to the successor in office, and regularly receipted for by him on behalf of the United States. But it is insisted, that if all these things are true, they do not authorise the charge. And why? Because it is denied that the tobacco was purchased on public account; or by authority or instructions of any officer of the government; and it is averred that tobacco is not an article which a navy agent is authorised to purchase on public account, but that it is to be furnished to our ships by the pursers

as part of their stores. It is also averred that the tobacco was the private property of the complainant, shipped to him from Norfolk, on his own account, and still remains his private property, and has never been accepted or legally transferred to the United States; that the navy department has never received any part of it, or interfered with it, or done any thing to recognise the validity of any transfer or purchase thereof; and that no officer of the department or the navy, had any authority to do so. In answer to all these denials and averments, what are the plain and uncontradicted facts of the transaction. This tobacco was originally purchased in Virginia, as the United States allege, as the private property of the complainant; after its arrival at Lima, it was sold by him to a Mr. M'Culloch; it was afterwards re-purchased by the complainant, as he alleges, for the United States. A part of this tobacco was distributed or delivered by the complainant, before his removal from office, to certain ships of the United States, and the residue, remaining in the store of the United States, was handed over, with the other stores, to Mr. White, the successor of the complainant, having been first surveyed by order of Commodore Thompson. From that day to this not a pound of it has been in the possession or under the control of the complainant; but that which has not been consumed in the ships of the United States, has continued in the possession of their agent. Why need we inquire whether, by the regulations of the navy, tobacco is to be furnished to our crews by a navy agent or a purser? If such be the regulation, undoubtedly it would have been a good and sufficient reason for refusing to receive this tobacco, either on board of the ships, or as part of the stores of the United States, and for leaving it on the hands of the complainant, for profit or loss as might happen; but it can never afford a justification for receiving the article, for actually consuming a part of it, and for retaining the residue, and refusing to pay for it. As for that part which has been delivered to the ships, a credit has been allowed, and thus far, at least, the purchase and sale have been recognised and adopted

by the department, notwithstanding the alleged navy regulation. In what respect, or on what principle of justice or equity, does the part of the tobacco, for which the complainant has been allowed a credit, differ from that for which it has been refused. The first was delivered to the pursers of the ships and has been consumed by their crews; the other has been delivered to their agent authorised to procure supplies for the navy, and has been by him distributed to the ships, or is still retained by him as the property of the United States. If he was not authorised to receive it, let him answer for it. It is enough for the complainant that he did receive it, and has receipted for it as the agent of the United States, and on their behalf. Suppose we should consider that the complainant was not warranted as a navy agent to make the purchase from Mr. M'Culloch for the United States. The consequence is, that it was his own property, and by him sold and delivered to Mr. White, who was the agent of the government. Is it any answer to the seller of an article to such an agent, to tell him that, by the navy regulations, the pursers and not the navy agents are to furnish tobacco to our ships, and therefore the United States may keep and use the article but are not bound to pay for it? This cannot be. If the tobacco was received from the complainant as public stores, then he has a right to charge for it the price he gave for it; if it was a sale by him to the public agent, then he has a right to receive its fair price or value for it, and we have no better way of ascertaining it than by taking the actual cost of it to him. I cannot deny that a suspicion hangs upon my mind, that the sale to Mr. M'Culloch was not a real transaction, but a contrivance to enable Mr. Armstrong to sell his tobacco to the United States at an advance or profit on its cost, which, as a public agent, he was not authorised to do. If this were clearly shown, it would have no effect on the case other than to deprive him of the profit, a few cents a pound, and compel him to pass it to the United States at its first cost in Virginia, and the charges of taking it to Lima. The evidence is not sufficiently explicit

on this point, to enable me to take this ground; and the objection has not been made at the treasury, from which, I presume they were satisfied in relation to it. I have, therefore, allowed the credit for the sum claimed in the complainant's account.

Decree. This cause coming on for final decision upon the bill, answer, replication, exhibits, depositions and other evidence: It is ordered, decreed and adjudged that the injunction heretofore granted in this cause, be and the same is hereby perpetuated, for and as to the sum of five thousand six hundred and twenty dollars and fifty-six cents, part of the sum or charge of twelve thousand eight hundred and seventy-five dollars and forty-four cents claimed by the defendants of and from the complainant, and for the recovery of which the warrant of distress in the bill mentioned was issued; and that the said defendants be and they are hereby perpetually enjoined from proceeding further against the complainant upon the said warrant of distress, for or on account of any claim or demand of and for the said sum of five thousand six hundred and twenty dollars and fifty-six cents. And it is further ordered, decreed, and adjudged, that the said injunction be dissolved, and it is hereby dissolved, for and as to the sum of seven thousand two hundred and fifty-four dollars and eighty-eight cents, the balance or remaining part of the said sum or charge of twelve thousand eight hundred and seventy-five dollars and forty-four cents, for the recovery of which the said warrant of distress was issued.

The following statement, to be filed with the decree, having reference to the account or claim of credits which accompanies the bill of the complainant, exhibits the items of that account which have been allowed and disallowed to him, in making the above decree.

| | |
|---|---|
| He has been allowed | |
| A commission of one per cent on stores distributed, | $ 208 80 |
| Clerk hire, | 268 75 |
| Damages on protested bills, | 863 33 |
| For tobacco delivered to the United States navy, | 4,279 68 |
| | 5,620 56 |

| | |
|---|---|
| He has not been allowed | |
| Commissions rejected at the last settlement, | $ 5,755 86 |
| His board while detained at Lima, | 1,609 87 |
| Compensation for the same time, | 3,229 15 |
| The two items for distribution of stores together, | 1,043 99 |
| His passage home, | 350 00 |
| Travelling to Washington, two items, | 43 50 |
| Commissions for stores handed over to Philo White, | 183 24 |
| Commissions on $80, paid to Mr. Henderson, | 4 00 |
| | $ 12,219 61 |

WILLIAM PIERCE

*v.*

JAMES PATTON OWNER OF THE BRIG ENTERPRISE.

1. Where a seaman is detained in gaol under the provisions of the act of 20th July, 1790, the cost of his commitment and support there, and also the charge for a person employed in his place, are to be deducted from his wages.
2. Where a seaman, in a foreign port, is taken on shore at his own solicitation, from a vessel properly provided with a chest of medicines, and there receives medical attendance and advice, the expenses thereof are to be deducted from his wages.
3. Where a seaman contracts disease by his own vices or faults, and in defiance of the counsel and command of his superior officers, the vessel is not chargeable for the expenses of his cure.

THIS was a claim by the libellant for wages, amounting to seventy-nine dollars and seventy-eight cents, earned, as he alleged, during a voyage in the brig Enterprise from Philadelphia to St. Jago and back. It appeared that on the outward voyage the vessel touched at Wilmington, in North Corolina, where the libellant was detained a few days in gaol, under the provisions of the act of 20th July, 1790. It also appeared, that by the indulgence of his own vices and gross negligence, in opposition to repeated warnings, he became so ill, that while at St. Jago, although there were excellent medicines on board the brig, he desired he might be taken on shore and receive the advice and attendance of a physician in the place. For the expenses incurred in consequence of these circumstances, the respondent claimed a deduction from the wages.

On the 29th May, 1833, the case was argued by RANDALL for the libellant, and GRINNELL for the respondent.

GRINNELL, for the respondent.

It is contended; 1. That the wages were all forfeited by desertion. 2. That there were a payment and set off, arising from moneys laid out for the libellant exceeding the amount of wages. They occurred in consequence of his desertion and misconduct.

The account leaves a balance of two dollars and ninety-two cents due to the respondent, even admitting that there was no forfeiture by the desertion. The physician's bill, charged by him to the libellant, is thirty dollars, and the expenses of the boarding and nursing on shore were twenty-two dollars and twenty-five cents, making together fifty-two dollars and twenty-five cents, all paid by the captain of the brig. Other payments and charges are claimed amounting in the whole to seventy-eight dollars and seventy cents.

RANDALL, for libellant.

There is no evidence of some of the items charged to be paid to libellant at St. Jago. We do not dispute the gaol fees paid at Wilmington, North Carolina; nor the charge for hiring a man in his place. As to the charges for medical attendance and nursing, the libellant denies his liability for them. All the decisions say that the ship must find a nurse for a sick seaman. The charge for nursing and boarding fall on the ship. 1 Peters Ad. Dec. lxxiv. Laws of Wisbury, art. 19. Laws of the Hanse Town, art. 45.

GRINNELL, for respondent, in reply.

If there are good and sufficient accommodations on board the vessel for a sick seaman, that is the place where he should be nursed and attended. Even in the case of a contagious disease, if he is put on shore at his own request, and not by the captain for the convenience or safety of the ship, the seaman is chargeable with the expenses incurred by his removal, for boarding, medical attendance, and nursing. So if the seaman engaged to pay the expenses; or if it can be gathered that such was the understanding of the parties, when he was put on shore, they shall be charged to him. There is, in this case, satisfactory evidence that such was the understanding.

But the sickness of the libellant was brought upon him by his own default and obstinacy. The men who slept on deck, as the libellant, contrary to orders, would do, were sick; those who slept below were not so. This is fully proved.

Judge HOPKINSON delivered the following opinion:

The payment of the wages, in this case, is resisted on two grounds. 1. An alleged desertion of the libellant, by leaving the ship before she was discharged, and her cargo delivered. 2. A set off or credit is claimed by the respondent, for moneys paid for the libellant, for medical attendance upon and nursing him during a sickness at St. Jago, exceeding, with some other charges, the amount of his wages.

| | |
|---|---|
| The medical and nursing bill amounts to, | $ 52 25 |
| Gaol fees and labour hired in the place of the libellant, at Wilmington, not disputed, | 11 25 |
| Advance of wages and hospital fees, | 15 20 |
| | $ 78 70 |

There is a charge of two dollars and sixty-nine cents, of which no exact proof is given, but the mate of the brig, the only witness examined, says that the captain advanced some money to Pierce at St. Jago, but he cannot say to what amount. The wages, from 15th May to 5th November, at fourteen dollars a month, will amount to seventy-nine dollars and seventy-eight cents. The charges made by respondent are seventy-eight dollars and seventy cents, exclusive of the two dollars and sixty-nine cents. This would leave a balance of but one dollar and eight cents due to libellant; but as the mate swears to an advance of some money at St. Jago, and the captain has charged two dollars and sixty-nine cents, we may reasonably consider this small balance to be absorbed in that payment; provided the other charges against the libellant are admissible.

Of the first ground of defence, the alleged desertion of the libellant before the brig was discharged, I shall say nothing; it is not necessary. The decision of the case will turn on the legality of the charge of fifty-two dollars and twenty-five cents for medicine, medical attendance, and boarding the libellant while sick on shore at St. Jago. It is clearly proved that the brig had a medicine chest fully supplied with the requisite and

usual medicines. It is also fully proved that the libellant was taken on shore by his own desire and request; and that he seemed to consider that it was to be at his own charge. The bill was charged to him, and not to the captain or ship, and when shown to him he made no objection to it or to his liability, but that it was too high. Being told that these charges absorbed all his wages, he made no demand of them, but acquiesced from the 5th of November, when the voyage ended, until the 20th of February, when he commenced this suit. These are strong circumstances to show that he knew or believed that the extraordinary expenses of his going on shore to be nursed and attended by a physician, were to be charged to himself. I shall not, however, rest my decision upon this point. The circumstances in which a ship is liable for curing a sick seaman, have frequently come under the consideration of courts of admiralty. Although some judges have inclined to be a little more liberal to mariners than others, the main principles are well settled, and generally adopted. Certainly on one point there is no doubt or difference, and that is, that when a seaman has contracted the disease by his own vices or fault, the ship is not chargeable with his cure. This then is the question in this case; a question of fact. We have no evidence but that of Mr. Thomas, the mate of the brig, who has not been impeached, and seems to be worthy of full credit. From his testimony it is undeniable that the libellant contracted the sickness in question by the indulgence of his vices; by gross negligence in opposition to repeated warnings; and by a determined obstinacy which resisted at once counsel and command.

Decree. That the libel be dismissed.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

AUGUST SESSIONS, 1833.

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THE UNITED STATES OF AMERICA

*v.*

HENRY BARTON.

1. Where an oath, required to be administered by a collector of the customs, is falsely taken before a legal deputy of the collector, acting under the provisions of, and in the cases required by the act of 2d March, 1799, it may be sufficient ground for an indictment for perjury.
2. Under the provisions of the act of 3d March, 1817, the deputy collector is not a mere agent, but is a permanent officer of the customs, and may exercise and perform the functions, powers and duties of the collector.
3. Where in acts subsequent to that of 3d March, 1817, the collector of the customs may administer an oath or perform any other act, it was unnecessary to authorise the deputy collector, for that follows of course.

On the 13th November, 1833, a warrant was issued by Judge HOPKINSON for the arrest of Henry Barton, charged on oath with swearing falsely, in a case where an oath was required from him, as the consignee of certain goods, wares and merchandise imported into the port of Philadelphia from a foreign place.

On the 29th November, the defendant was brought up for hearing, and the following facts were given in evidence.

On the 9th July, 1832, the ship Arab, captain Ball, arrived at this port, having on board, among other things, two casks of hardware, consigned to the defendant. On the 18th August

following, he entered these goods at the custom house, and at the time of entry produced an invoice of them, which was marked at the time by the appraisers, and identified on this hearing. Annexed to the entry was the following oath of the defendant, made pursuant to the provisions of the fourth section of the act of 1st March, 1823. "I, Henry Barton, do solemnly and truly swear, that the entry now delivered by me to the collector of Philadelphia, contains a just and true account of all the goods, wares and merchandise imported by or consigned to me, in the ship Arab, whereof Ball is master, from Liverpool; that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, drying, dressing, putting up, and no other discount, drawback or bounty but such as has been actually allowed on the same; and that I do not know nor believe in the existence of any invoice or bill of lading other than those now produced by me, and that they are in the state in which I actually received them. And I do further solemnly and truly swear, that I have not, in the said entry or invoice, concealed or suppressed any thing whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise; and that if, at any time hereafter, I discover any error in the said invoice, or in the account now produced of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. So help me God. (Signed) Henry Barton. Sworn this 18th August, 1832, before me, J. K. Dy. Collector." Mr. John Kern, the deputy collector of the port of Philadelphia, testified, that this oath was administered by him to the defendant at the custom house, at the time of entry, and marked by him with his initials at the same time. Evidence was then produced, on the part of the United States, to show that the invoice, exhibited by the defendant and left at the custom house, was not in fact the original invoice received with the goods, nor one containing a just

and faithful account of their actual cost; that it was made up here, after the arrival of the goods, by a person in the employment, and with the knowledge of the defendant; and that although the list of the articles was copied from the original received from Liverpool, yet the prices annexed were considerably altered.

The case was argued by MEREDITH and SCOTT for the defendant, and GILPIN, District Attorney, for the United States.

MEREDITH, for the defendant.

Reserving for another stage of this case, all remarks on the sufficiency of the testimony and the truth of the allegations, there is yet a fatal objection to these proceedings against the defendant. On legal grounds, he cannot be held to bail to answer this charge, for no evidence has been given of an offence punishable by the statutes of the United States. It is unnecessary to say that Henry Barton cannot be prosecuted here for perjury at common law; an indictment against him can only be sustained, if he has violated the provisions of an act of congress. This, however, he has not done. The fourth section of the act of 1st March, 1823, provides, "that in all cases where goods, wares or merchandise shall have been imported into the United States, and shall be entered by invoice, one of the following oaths, according to the nature of the case, shall be administered by the collector of the port, at the time of entry, to the owner, importer, consignee or agent, in lieu of the oath now prescribed by law in such case." The form of an oath, similar to that taken by the defendant, is then given. In this case the oath was administered by the deputy collector, an officer in whom no such power is any where vested. The power is limited expressly to the collector. The various laws referring to the appointment and duties of the deputy, never confer this upon him. The twenty-second section of the act of 2d March, 1799, authorises the collector to exercise the duties of his office by deputy "when sick or necessarily absent." If even this provision could extend to duties designated by future laws, yet here no such necessity or absence has been shown; on the con-

trary, it has been the usual practice for the deputy collector always to administer these oaths. The ninety-fifth section of the same law is only applicable to similar cases of necessity or absence. The seventh section of the act of 3d March, 1817, which authorises the appointment of deputy collectors, gives them no authority to administer oaths, though it recognises them as officers of the customs. When the act of 2d March, 1821, was passed, which does authorise deputy collectors to administer an oath verifying a manifest, it expressly confined the power to deputy collectors residing in districts adjacent to the boundary lines of the United States; it confers no such authority on deputies residing in sea-ports. Finally; when the act of 1st March, 1823, is passed, although the deputy collector has become a legal and recognised officer of the customs, this important duty is intrusted to the collector alone. The courts cannot intrust it to any other officer than the law has seen fit to do. Of course, they cannot make an act criminal which was never contemplated, much less forbidden by any statute. 1 Story's Laws, 592. 658. 3 Story's Laws, 1650. 1811. 1848. 1882.

Gilpin, for the United States.

The act of congress of 1st March, 1823, requires every importer or consignee to enter his goods and to produce, at the time of entry, the original invoice received by him. The law evidently refers to and contemplates the exhibition of an invoice received from abroad with the goods. To verify it as such an instrument, it obliges the importer to swear, at the time, that it is the only invoice received by him, and that it contains a just and faithful account of the cost of his goods: to make this obligation more explicit, it sets forth in words the exact oath which is to be taken. The eighteenth section of the act of 30th April, 1790, declares that if any person shall wilfully and corruptly commit perjury, in any deposition taken pursuant to the laws of the United States, he shall, on conviction, be punished; and the thirteenth section of the act of 3d March, 1825, which more particularly prescribes and defines offences against the United

States, declares that if any person, in any case, matter, hearing or other proceeding, when an oath or affirmation shall be required to be taken or administered, under or by any law of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, he shall be deemed guilty of perjury, and on conviction be punished accordingly. In this case the facts have been established beyond contradiction. An entry was made at the custom house by the defendant; he produced at the time a certain invoice; he subscribed and swore to a declaration, in the very words required by the law, that the invoice in question was the original one received by him; and it has been proved that it was not that instrument, but one made for the occasion by a person in his employment and with his knowledge. To meet this state of the law and facts, one ground alone is taken on behalf of the defendant, which is, that he is not guilty of perjury, because the oath taken by him was not administered by the collector; and that a deputy collector has no authority to administer it. To this it is replied, in the first place, that the facts proved are sufficient to hold the defendant to bail; and that the objection will come up properly on his indictment, not on his arrest. But in the next place, the offence, as proved, is clearly a case of perjury; it is a false oath knowingly taken in a matter arising under a law of the United States. By the ninety-fifth section of the act of 2d March, 1799, it is expressly declared that "all matters directed to be done by the collector may be done by the person authorised to act in his stead." And by the seventh section of the act of 3d March, 1817, which is made perpetual by the fourth section of the act of 6th May, 1822, deputy collectors are expressly declared to be officers of the customs; not mere deputies, to act in cases of necessity or absence, but permanent officers, authorised at all times "to act in the stead of the collector," as they might occasionally and incidentally do, under the old law. Now the power to administer this oath is no more a power specially given to the collector than all his other powers; consequently it falls within the duty of his

deputy, as much as they do. In exercising it he executes a legal authority, and the act becomes in all respects a matter arising under a law of the United States. 1 Story's Laws, 87. 3 Story's Laws, 2002.

Scott, for the defendant, in reply.

The United States are bound to establish that an oath was taken by the defendant; that it was false in fact; and that it was administered by a person who had a right to administer it. Every circumstance and fact necessary to give authority to such person, must be shown in this stage of the cause; otherwise there is not even a primâ facie case against the defendant, or any just ground for holding him to bail. The oath that was administered, and which is exhibited in evidence, is wrong in point of form. It appears on its face to be taken before the deputy collector, when that prescribed and set out in the act of congress, is to be taken before the collector himself. The governing law on the subject, is the original act of 2d March, 1799, which, in its twenty-first section, points out with great precision the duties and powers of the collector, and in that which follows, those of his deputy in case of his absence or sickness. In the thirtieth and thirty-sixth sections it gives the forms of oaths to be taken in certain cases; it prescribes the collector as the officer by whom they are to be administered; and it designates him, or a judge of the United States, or a judge of some state court of record, as the person, before whom an importer is to verify his entries. It is thus apparent that the law regarded this power as one of peculiar trust; not such as falls within the province of an ordinary deputy; not one belonging as a matter of course to every officer of the customs. In 1821, by the first section of the act of 2d March, a deputy collector is, for the first time, authorised to administer such an oath; but it is limited to the exigency of the case, it is confined to deputies along the Canada frontier, who must be numerous, and of necessity exercise this power to prevent extensive frauds. The express authority thus given in a particular case, is a proof that it was not considered as implied by or incidental to the office, as previously constituted. Thus,

then, the law stood in 1823, when the oath alleged to be violated by the defendant was prescribed; at this time deputies were in existence; they were officers known to the law; a power of administering oaths had been conferred on them in a special case; yet in a law very elaborately drawn up it is not again extended to them; such an omission would restrain any general power if it had been given before; but when, as we have seen, it was not previously conferred, the present want of it is conclusive proof that there was no intention to authorise it by implication.

Judge HOPKINSON delivered the following opinion:

By the twenty-second section of the act of 2d March, 1799, (1 Story, 592) the collector, in cases of occasional and necessary absence, or of sickness, and not otherwise, may exercise and perform his functions, powers and duties by deputy, duly constituted under his hand and seal; and he is to be answerable for the acts of this deputy. This deputy is not a permanent officer; his appointment is for the necessity or occasion which called for it, and terminates with it. He is the mere personal substitute of the collector; appointed by him, in the cases authorised by the law. The nature and manner of the appointment shows this: and it is made more manifest by what follows; that, in case of the disability or death of the collector, his duties and authorities shall devolve upon his deputy, 'if any there be at the time;' which implies, that there was no such permanent office or officer as a deputy.

Under this law, the question would arise, whether as there were cases and circumstances in which a deputy of the collector might perform his functions, including the administering of an oath, it would not be enough, on this hearing, to show that the person who administered the oath, was the deputy of the collector, and refer it to the evidence to be produced at the trial, whether the facts existed which gave him authority to do so.

This case, however, stands on other, perhaps on stronger ground. By the seventh section of the act of 3d March, 1817, (3

Story, 1650) every collector "shall have authority, with the approbation of the secretary of the treasury, to employ, within his district, such number of proper persons, as deputy collectors of the customs, as he shall judge necessary, who are hereby declared to be officers of the customs." The deputy, then, is no longer a mere agent or substitute of the collector, to be appointed from time to time, as the necessity may arise, from the absence, sickness or disability of the collector, but he is a constituted, a permanent officer of the customs, to be appointed with the approbation of the secretary of the treasury. What, then, are his powers? Generally speaking, a deputy, without any limitation of his authority, would have the authority of the principal. When the law creating the appointment and office has imposed no restrictions, we can put none: we must suppose that, as the permanent deputy is the substitute for the temporary officer authorised by the law of 1799, he must have the same powers and duties; that is, he may exercise and perform the functions, powers and duties of the collector.

The suggestion that authority to appoint deputies is given only to the collectors of districts adjoining the Canada frontier, has no support, either from the words of the law, its obvious policy, or the practice under it. The act declares that "every collector of the customs" shall have this authority; and every collector has used and exercised it from the passage of the law.

When, in subsequent acts of congress, it is declared, that the collector may administer an oath, or perform any other act or duty, it was unnecessary to add, "or the deputy collector," for that followed of course, if the construction now given to the act of 1817, is correct.

If, on the trial, it shall be thought advisable to give this question a more thorough examination, an opportunity will be afforded to do so.

Ordered. That the defendant, Henry Barton, enter into a recognizance, with sufficient sureties, in the sum of one thousand dollars, conditioned for his appearance at next April sessions of the Circuit Court of the United States.

## DISTRICT COURT OF THE UNITED STATES.

### Eastern District of Pennsylvania.

NOVEMBER SESSIONS, 1833.

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FORDYCE HOLMES

*v.*

JOSEPH B. HUTCHINSON, MASTER OF THE BRIG PARAGON.

1. Where a seaman in a foreign port, contracts an ordinary disease without any fault of his own, and remains on board a vessel which is properly provided with a chest of medicines, the expenses for the attendance and advice of a physician, if evidently necessary for the safety of his life, are to be deducted from his wages.
2. Where a seaman is disabled by an accident in the actual discharge of his duty, he is to be cured at the expense of the ship.

On the 1st November, 1833, this case was argued by TROUBAT, for the libellant, and HURST, for the respondent.

On the 22d November, 1833, Judge HOPKINSON delivered the following opinion:

The libel, in this case, states a contract for a voyage from the port of Philadelphia to Vera Cruz, and thence back to Philadelphia, at the wages of fourteen dollars a month. The voyage commenced on the 22d June, 1833, and ended on 15th October, of the same year. The libellant avers a performance, in all things, of his duties as a mariner, and, after admitting certain credits, claims a balance of thirty-five dollars

and twenty-five cents to be due to him. On the part of the respondent a further credit is claimed of sixteen dollars, being the amount of a physician's bill paid by the master of the vessel, for attending the libellant in a sickness at Vera Cruz. The only matter in dispute between the parties is, whether this bill is chargeable to the libellant or to the owners of the brig.

The sickness, with which the libellant was afflicted, was a typhus fever, which was not contracted by any fault or negligence on his part, nor does it appear to be an endemic disease of the climate. The brig had a medicine chest, properly put up, according to the directions of the act of congress, and from it the libellant was supplied with the medicines used in his sickness, and he remained on board the brig. The physician was sent for by the captain when the libellant was in a state of delirium, and the charge is wholly for medical advice and attendance.

This is a case, in which: 1. The sickness was not produced by the fault of the seaman, nor contracted previous to his shipment. 2. It was not produced by any accident while engaged in service on board of the brig and in the discharge of his duty. 3. It was not an endemic disease of the climate to which the seaman was exposed. 4. It was not a contagious disease, dangerous to the crew, which made it necessary for their safety, to remove the man from the vessel, thereby incurring extraordinary expenses. 5. It was an ordinary disease which the man might have had any where, in any other place or employment.

I have found no precedent for charging the ship, in such a case, with the physician's bill for advice and attendance, even by judges most inclined to favour the seaman. It is not a question of boarding or nursing on shore during a sickness, but for the services of a physician evidently necessary for the safety of the life of the man; it would have been inhuman if the captain had not sent for him. But if the expense of medical aid is to be a charge upon the owners of the vessel, the master may be reluctant to obtain it, or altogether neglect it. The

seaman, therefore, has an interest in taking the charge upon himself, although the physician may be called by the direction of the captain, in circumstances when the seaman could not be consulted about it.

The law of the United States seems to be settled on this subject, on the general principles of the maritime law, with such modifications as our act of congress has introduced. It is not to be doubted that, when a sailor is disabled in the actual performance of his duty, he is to be cured at the expense of the ship; but, on the other hand, when the sickness or disability is the consequence of his own misconduct or irregularities, he must be cured at his own charge. Judge Peters was not satisfied that the sick seaman should pay for medical advice, but that such advice, as well as the medicine, should be furnished at the charge of the ship, to complete the intent of the provision of the law, because of the inefficacy or danger of medicines administered ignorantly or carelessly. But he admits that the weight of authority is against this opinion, and he, very properly, yields to it; and agrees that the seaman had better pay for medical advice than risk the consequences of an indiscreet use of the medicine chest. He says, in the case of Walton v. The Neptune, (1 Peters Ad. Dec. 152,) "By the terms, in the alternative in the act of congress, that if the ship has no medicine chest, the owners shall pay the physician's bill, it seems, that if the ship is furnished with the chest, the sailor must pay for advice; but the ship must supply the medicine." In another case, that of Hastings v. The Happy Return, (1 Peters Ad. Dec. 256,) the same judge speaks again on this subject: "The charge for medical advice is commonly mixed, in the gross, with the general items, per day or week, for boarding and attendance. The sailor must only pay for the former." After some further remarks, he says; "When one of a crew is seized with an infectious disease, he should be removed from the rest, and sent on shore, at the ship's expense, for the safety of the whole, and the advantage of the owner, who must count on extra disbursements if he will trade to ports or places, lia-

ble to such casualties." He adds that it ought to be borne by the ship, "from motives both of humanity and justice." This is well when the sick man is taken fron the ship for the safety of the crew and the advantage of the owner, but I do not feel the force of any claim, on the part of the seaman, because the vessel is trading to a port or place liable to dangerous diseases. This he knew when he made his contract, and if it exposed him to extra expenses, as well as risk, it may be presumed that he took them into his calculation in fixing the price of his services, the amount of his wages; in this way, the owner has paid extra disbursements for this danger and these expenses. We shall have a very uncertain rule, if the legality of this charge upon the owners of a vessel is to be governed or regulated by the healthiness of the trade in which she may be employed, or the places to which she may go. In the conclusion of the judge's observations, he says: "Although, in ordinary cases, having a medicine chest on board may be a compliance with the act of congress, exceptions should be made where dangerous diseases require and compel extraordinary remedies and expense." By dangerous diseases we must understand such as had been previously mentioned by the judge, that is, infectious diseases, dangerous to the rest of the crew, and not merely dangerous to the person afflicted; for in the latter sense every disease might be included, according to its violence and the condition of the patient.

In the case of Harden v. Gordon, (2 Mason, 541,) the court said, that "its researches had not enabled it to detect a single instance in which the maritime laws of any foreign country throw upon seamen, disabled or taken sick in the service of the ship, without their own fault, the expenses of the cure." And it was also decided in that case, "that the act of congress had not changed the maritime law, except so far as respected the expenses of medicine and medical advice, when the proper medicine chest was on board, and within reach of the seaman." It is added, that "the charges of nursing and lodging, in all cases, and even of medicines and medical advice, in cases

of a removal from the ship, were still to be charges against the ship."

It must now be taken to be the law of the United States, under our act of congress, that in the case of an ordinary sickness, not infectious or dangerous to the crew so as to render a removal from the ship prudent or necessary, and when no such removal is made, and the ship is provided with a medicine chest according to the directions of the act of congress, the medical advice of the sick seaman, is not chargeable to the ship.

Even under this modification of the general maritime law, it cannot be denied that sailors are highly favoured, and have advantages and privileges which belong to no other men who labour for stipulated wages. Other labourers in agriculture, in trades, in mechanical arts, are not only obliged, in case of sickness, accident, or other disability to maintain themselves and pay all the expenses of nursing, medicine, and medical attendance, but their wages, their only source of revenue, the only means by which they can provide for such expenditures, are stopped. The sailor, on the contrary, is still maintained by the ship, nursed at her expense, and furnished with necessary medicines, and his wages run on although he may not do a stroke of work for the whole voyage. It is true the seaman may lose his wages, however hardly earned, by casualties, to which the labourers on land are not exposed; but, in time of peace, they are of rare occurrence, and are scarcely considered in the contract. When they are more considerable, they have a proportionable influence on the rate of wages.

Decree. That the libellant, Fordyce Holmes, recover and have paid to him the sum of nineteen dollars and twenty-five cents, with costs.

## DISTRICT COURT OF THE UNITED STATES.

### Eastern District of Pennsylvania.

FEBRUARY SESSIONS, 1834.

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MARINE T. WICKHAM

*v.*

WILLIAM P. BLIGHT, OWNER OF THE SHIP ELIZA.

1. The court will be very reluctant to get rid, by any equitable or convenient construction, of the unequivocal provisions of the act of 20th July, 1790, which oblige a master who carries out a seaman, without first making a written contract, to pay him the highest wages of the port at which he shipped.
2. Where shipping articles have been signed by a seaman and delivered to the master, and the amount of wages is omitted by mistake or accident, without fraud, it is competent to either party to show, by parol testimony, what the contract was in relation to wages.

THE libel in this case, which was filed on the 28th April, 1834, set forth that the libellant signed an agreement on the 5th December, 1832, to perform a voyage in the ship Eliza, from Philadelphia to Canton and back. The libellant does not allege that any rate of wages was stated in the agreement, but declares that he faithfully performed his duty during the voyage, and that by reason of his services the sum of one hundred and twenty-eight dollars and sixty-six cents is due.

The respondent, in his answer, admits the signing of the shipping articles and the performance of the services, but alleges that the libellant was received on board the vessel before her departure at his own request, for the purpose of acquiring a

knowledge of seamanship, and that he agreed to perform the voyage without wages, and signed the articles accordingly.

On the 8th May, the case came on to be heard before Judge HOPKINSON. It was argued by BADGER for the libellant, and DUNLAP for the respondent. It appeared that the shipping articles, which were produced by the respondent, had been regularly signed by the libellant, but that no amount of wages was stated; thereupon the counsel for the libellant offered to give parol evidence of the rate of wages at which he shipped. To this evidence the counsel for the respondent objected.

On the 9th May, Judge HOPKINSON delivered the following opinion:

This is a libel for wages for services as a seaman on board the ship Eliza, on a voyage from Philadelphia to Canton, and back to Philadelphia. The libellant signed the shipping articles, but no rate of wages was carried out or inserted in the column prepared for that purpose, nor in any other part of the articles. The libellant offers to prove, by parol evidence, the rate of wages for which he shipped, and the proof is objected to by the respondent.

The questions now to be decided are on this objection.

1. Does this omission or imperfection in the articles so destroy their whole effect, that there is no agreement in writing made between the seaman and the master of the vessel?

2. Is it an agreement in writing to render the services without wages?

3. Is the omission to be considered a fraud or mistake which may now be supplied by parol evidence?

In the first case, that is, of a seaman taken and carried out without a contract in writing being first made and signed by the seaman, it is declared by the act of congress, that the master shall pay to such seaman, the highest price of wages, which shall have been given at the port or place where such seaman shall have been shipped, for a similar voyage, within three months next before the time of such shipping: and a penalty is

also inflicted on the master, and the seaman is declared not to be bound by the regulations, nor subject to the penalties or forfeiture specified in the act.

The construction or intent of this enactment is thrown into some uncertainty, by a difference of opinion between two learned and experienced admiralty judges. In the case of Jameson v. The Regulus, (1 Peters Ad. Dec. 213) Judge Peters said that he has been of opinion, that the agreement of the parties, though verbal, supersedes the provision of the law, that an unarticled seaman shall be paid the highest wages. Of course, he construes the act to mean, that such wages shall be paid only where there has been no agreement whatever between the seaman and the master, and does not extend it to the case where the agreement has not been made in writing: that is, he thinks that where there has been an agreement for the rate of wages, it may be proved and shall be received as the contract of the parties, and govern the case, although not made in writing. Judge Story (Abbot's Ship. 433) does not seem to be satisfied with this opinion, although he does not expressly repudiate it, nor was he called upon to do so. He says, no case is referred to, where such a decision has been made, and that it requires very grave consideration, how far such a verbal agreement should be admitted to supersede the positive directions of the statute as to the highest wages.

I shall leave this question as it stands, between these learned judges, until a case shall occur in which it will be required of me to decide it; only intimating, as I have done on other occasions, my strong reluctance to get rid of the plain and unequivocal language of the statute, by equitable or convenient constructive limitations or modifications. But I cannot say, in this case, that the contract is absolutely not in writing. The articles are signed by the seaman, and delivered to the master. The difficulty is, to say what it is in respect to the wages. It is a clear and written contract on every other subject. It is an imperfect written contract.

2. Can we consider this omission to state the rate of wages,

this blank not filled in the articles, as an affirmative contract that the libellant agreed to serve without wages? This is the defence taken in the respondent's answer, and not that there was no written agreement. It is true, that such agreements are sometimes made by novices, who are desirous of obtaining instruction and experience in the business and duties of a seaman; and when it so appears in the contract, when such intention is declared, there is nothing unreasonable in it, to bring it into question. But I cannot infer it from a mere omission, and that by the master himself, or the mate, whose duty it was to make the contract complete, and to state, that the services were to be given without wages, if such were the fact. I cannot make an affirmative contract out of a negative circumstance, which admits of another explanation or interpretation. The seaman was called upon merely to sign his name to the articles; he did so. All the rest it was the duty of the master to do in the manner prescribed by the act of congress; and, if there was a contract for wages, he shall not escape from it, and have the services of the seaman without compensation, by omitting or neglecting to put that contract in writing.

3. The last view of the case is, was the omission a fraud or mistake, and if so, may it not be supplied or rectified by parol evidence? Is it not an ambiguity, which may be explained? In Pennsylvania (Dinkle v. Marshall, 3 Binney 587) declarations of a grantor, even in the case of a deed (and this is not an instrument of that legal solemnity, but a personal contract,) at and immediately before the sealing and delivery, are admitted to show the intention of the parties, so far in contradiction of the deed, as to prove that the grantor did not intend to convey, what might be included in the description of the deed. Evidence may also be given to prove what passed before and at the time of the execution of the deed, if the party offering the evidence alleges fraud or mistake in the transaction. In the case of Abbot v. Massey (3 Vesey, 148) a bequest was made to Mrs. G., and the chancellor referred it to the master to receive evidence to show who was intended by the initial. So where the surname

was given in a will, but not the Christian name, the party claiming a legacy was allowed to produce parol proof, (Price v. Page, 4 Vesey 680,) and, where in an agreement to deliver goods, there is a blank for the quantity, parol evidence may be admitted to show the quantity. It could not be evidence to contradict any part of the written agreement, but merely to supply an omisssion. Phillips Ev. 475.

I consider the omission to put the rate of wages into this contract, or to state expressly that the libellant was to serve without wages as an omission, a mistake on the part of the master himself, and without any fault on the part of the seaman, and that it is now competent for either party to show what the contract was in relation to wages, to supply the omission in the written agreement arising from this mistake. I am entirely satisfied that no fraud was intended by it.

Judge Hopkinson admitted the evidence.

Decree. That the libellant, Marine T. Wickham, recover and have paid to him the sum of sixty dollars, with costs.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

MAY SESSIONS, 1834.

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WILLIAM PATTON AND SAMUEL D. DICKSON

*v.*

THE SCHOONER RANDOLPH.

1. A case of necessity alone authorises a master to pledge his vessel by giving a bottomry bond.
2. The master cannot pledge a vessel by giving a bottomry bond for money borrowed for repairs, when the owners of the vessel are present at the place where the repairs are made, or when he has funds of the owners, which he has not used, for the purpose.
3. One part owner cannot take from the master a bottomry bond on the share of another part owner, for repairs done to the vessel.
4. It seems to be the better opinion, that one part owner of a vessel has not a lien on the share of another part owner, for a balance which may be due to him.

THIS case was argued by J. R. INGERSOLL for the libellants, and C. GILPIN for the respondents.

On the 23d July, 1834, Judge HOPKINSON delivered the following opinion:

There seems to be no question about the material facts of this case. The vessel sailed from Philadelphia, bound to Charleston; the respondents, Sloan and Morris, being the owners of one-fourth part of her. At Charleston certain repairs were required, and were made and paid for by moneys advanced by the libellants, Patton and Dickson, to

whom the captain gave a bottomry bond, on the one-fourth part of the schooner belonging to Sloan and Morris, to secure the repayment of their advances. The libellants were then in Charleston, and part owners of the vessel, the captain himself being the other part owner. Various grounds of defence against this bond have been taken and insisted upon on the part of the respondents. In the first place, it appears that, prior to the execution of the bond, Sloan and Morris had made an assignment of their share and interest in this schooner to assignees for the benefit of their general creditors, and that this assignment was known to captain Doyle, as well as to the libellants, the obligees in the bond, before the execution of the bond; but the assignment was subsequent to the making of the repairs for which the money was advanced. I pass by the question, whether the assignment or the bond should be preferred in such a case.

A second question has been raised. Can a part owner take a bottomry bond on the share of another owner, for repairs done to the vessel? It is to be recollected that the bond and pledge or hypothecation of the vessel are given by the captain, to raise money, by borrowing, for the outfit of the vessel, in order that she may prosecute her voyage. It is an extraordinary power over the property of another, and strictly confined to the cases of necessity which authorise it. But of whom, in this case, did the captain borrow the money he wanted? Of the very persons who were themselves personally responsible for the whole debt. He borrowed money from Patton and Dickson to pay the debts of Patton and Dickson. This is, at least, a novelty. It is difficult to reject the suggestion, that it was a device got up by the captain and the libellants, after they heard of the failure and assignment of their co-partners, Sloan and Morris, to appropriate to themselves their share of the schooner, in order to indemnify them for the share of Sloan and Morris, in the advances made for the repairs at Charleston. They, therefore, became lenders to the captain to pay their own debts, contracted for the repairs of their own vessel.

Two objections to the bond, as an hypothecation of the schooner, remain; either of which, in my opinion, is sufficient to destroy its validity.

The first objection is, that, at the time the money was borrowed, if it can be so considered, and the bond given, two of the owners, besides the captain himself, were actually in Charleston, where the repairs were made and the debts contracted; in fact, the owners of three-fourths of the schooner were present. Can the captain of a vessel pledge her for money borrowed for her repairs in such a case? If the captain, instead of getting this money from his owners, or of applying to them for funds, had borrowed it from strangers, in their presence, and pledged their vessel for its repayment, would they have deemed it a valid act; would they have submitted to such an exercise of power over their property? His power is not altered or enlarged because he resorted to them for the money, pledging to them the interest of an absent owner. In the presence of the owner of a vessel, on whose personal credit it is presumed the money necessary for the prosecution of a voyage may be obtained, the case of necessity does not exist which alone authorises a captain to assume a power, not belonging to his ordinary duties or authority, to pledge his vessel. I consider, then, the residence or presence of some of the owners of this schooner, at the place where the repairs were made, and the money taken up, as sufficient to destroy the validity of this bond, as an instrument without authority.

The other objection is equally fatal to it, and on the same general ground, that is, the absence of that necessity, which alone confers the power on the captain to execute such a bond. Sloan and Morris, whose share in the schooner is hypothecated, sent out in her, as their own separate property, seventy-nine barrels of flour, which was sold at Charleston by the captain for five dollars and seventy-five cents per barrel. He got a note from the purchaser, which he had discounted on the 12th February, and received thereon four hundred and twelve dollars; more than the share of Sloan and Morris of the advances made

for repairs; more than the sum for which their part of the schooner was hypothecated. The bond is dated on the 15th of March, 1834, a little more than a month after these funds came into the captain's hands, and after the repairs had been made; so that after these debts for repairs were contracted, the captain actually had in his hands money enough to pay for them, or at least for the portion chargeable to the respondents. Why did he not so apply it? He says he disposed of these funds in the purchase of their paper, which was then good, but admits that he had no instructions from Sloan and Morris to apply them in this way. Can the master of a vessel dispose of his owner's funds, at his own pleasure, and thus create a necessity which is to give him an authority to hypothecate their vessel? I apprehend not. We are here again compelled to see that the execution of this bond did not arise out of any necessity to procure money to pay for the repairs of the vessel, and get her out of the hands of those who had furnished the materials and done the work of her repairs; but it was an expedient to secure to the owners at Charleston, who had paid for the whole, a reimbursement of the one-fourth part chargeable to Sloan and Morris, and to get it from their general creditors, to whom an assignment had been made of their interest in this schooner. I do not say there was any thing unfair in making the experiment, but I think the law will not sanction it.

It has been suggested by the counsel of the libellants, that a joint owner has a lien on the share of his co-owner of a vessel for a balance which may be due to him. Opinions on this point have differed, and it appears to me that the better opinion is against this doctrine. I should be disposed to follow the opinion of Lord Eldon in the case of Young ex parte, (2 Ves. & Bea. 242,) as Chancellor Kent did on this question in the case of Mumford v. Nicoll, (4 Johnson Ch. R. 522,) although a majority of the judges in the New York Court of Appeals seemed inclined to support the opinion of Lord Hardwicke, in the case of Doddington v. Hallet, (1 Vezey, 497,) which was in favour of the lien. If, however, such a lien were admitted to exist, can

it be enforced by a libel in the admiralty? Or when a libel has been filed, setting forth a claim founded on a bottomry bond, and on that only, can the libellants, finding themselves unable to sustain that claim, withdraw it, or have it dismissed, and then substitute, in its place, another claim altogether different, and of which the court, originally, could have taken no cognizance? It is wholly unlike the case in which chancery, having jurisdiction of the principal matter, will take it over collateral subjects, although they would not, by themselves, have been liable to it.

DECREE. That the libel be dismissed, with costs.

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JOHN EDWARDS, MICHAEL KEATING AND JOHN POWELL

*v.*

WILLIAM E. SHERMAN, MASTER OF THE BRIG ELIZA.

1. Where articles belonging to the cargo are embezzled by the fraud or negligence of a seaman, he is chargeable for the value, and the amount may be deducted from his wages.
2. Where articles belonging to the cargo are embezzled, an innocent seaman is not chargeable for the loss occasioned by the fraud or negligence of others, nor is he to contribute any portion from his wages to make it good.

THE libellants claimed wages as mariners on board the brig Eliza, on a voyage from the port of Philadelphia to Vera Cruz, and thence back to Philadelphia, commencing on the 9th day of January, and ending on the 16th of April of the same year, at nineteen dollars per month.

The answer admits that the libellants shipped for the voyage as set forth in their libel, and that they performed it, but alleges

that the brig was loaded at Vera Cruz on or about the 23d of March, and that, among other things, there were shipped on board of her three bags containing three thousand two hundred hard silver dollars, marked W. L.; one containing one thousand dollars, marked J. C.; and one containing five hundred, marked G. D.; all of which were stowed in the run under the cabin floor. On the arrival of the brig at Philadelphia, a part of the specie was missing from each bag, which the respondent firmly believes and avers was embezzled by some of the crew. The amount embezzled was one hundred and three dollars out of one bag, and sixty-four dollars out of each of the others, which the respondent claims to be deducted from the wages of the officers and crew in due proportions. The libellants reply that they are not informed whether the number of bags, containing the amount of money mentioned, were put on board or not; nor whether any part thereof was missing, on the arrival of the vessel at Philadelphia; but they deny that any part or portion of it was embezzled by them, or by any of the crew, to their knowledge; or that any part thereof was lost through their fault, negligence or misconduct.

The case was argued by RANDALL, for the libellants, and J. R. INGERSOLL, for the respondent.

J. R. INGERSOLL, for the respondent.

It is sufficient if the crime is traced to the crew, although not fixed on any individually. Spurr v. Pearson, 1 Mason, 115.

This depredation must have been made before the vessel sailed; no access by the crew could have been had afterwards. The mate of the vessel has testified, that he took the money on board at Vera Cruz, between the 18th and 25th of March. There were two bars of bullion, and twenty-four bags of specie, which came on board at different times; twenty-three of these bags were sewed with twine, and one tied with a string, which belonged to one of the passengers. Some of the money the captain brought on board himself; he thinks five or six bags. It was all put in the run. The witness brought some

of the bags on board, thought some of them were loosely woven, could see the money through them. The scuttle was put down, a bar was put over the staple, and a lock put through it. The lock was not locked, being broken. The run had not a solid bulk head. Water casks and boards formed the bulk head. The steerage hatch was not secured. Witness brought all the bags on board, except the five or six brought by the captain. The witness had two men with him when he went for stores, and brought one bag every time he went. The bags were made of grass, two or three of them of duck. The money might have been forced through the grass bags. One of the bags burst while he was taking it in, none could have been spilt in the run. There were eleven passengers. The run was opened several times during the passage. There were stores in the run. The sailors could have no access to the run from the steerage. The bags when taken out here, appeared to be in the same condition as when put in. They were delivered here to the clerk of Mr. Stevenson the owner. When the witness went several times to the run, he observed nothing changed, as to the lock. He had not seen the crew with any unusual amount of money; he lent them some at Vera Cruz. The steward had constant access to the run. None of the men were sent there. The steward had a good deal of money in his possession.

The clerk of Mr. Stevenson has proved the deficiency of money in the bags as stated. He said there were four bags loosely woven, that he took out several dollars through the bags. There was no appearance of violence about them.

Randall, for the libellants.

On the facts proved by the respondent there is no ground for charging the crew with the loss of this money. Abbott's Ship. 472. Mariners v. The Kensington, 1 Peters Ad. Dec. 239. 341. Spurr v. Pearson, 1 Mason, 104. Lewis v. Davis, 3 Johnson, 17. Thompson v. Collins, 4 Bos. & Pul. 347.

J. R. Ingersoll, for the respondent, in reply.

From the mode of life and associations of sailors, a crime

can hardly be done by any one of them, without being known to the others. It is their duty to guard their owners against such losses and to inform them of them. It is apparent from the testimony, that the money was taken before the vessel sailed, and at that time there was nobody on board but the crew.

On the 29th May, Judge HOPKINSON delivered the following opinion:

The law of this district upon the subject of a loss of a part of the cargo or other articles from the ship, I have thought exceedingly severe, and indeed unjust to the crew. It is, as far as I know, peculiar to this district, and goes far beyond the doctrine of the courts of England, and exceeds that of other districts of the United States. It seems to me to impose a liability on a sailor, not warranted by his contract, which assuredly binds him to a faithful performance of his own duty, but does not make him the surety for all and each of a crew, who are perhaps absolute strangers to him, and who are brought on board the vessel without his act, acquiescence or knowledge. It is converting a ship's company into a novel kind of partnership, in which each one is made answerable, nolens volens, for the acts and crimes of any and all the rest, and this without his having any choice or agency in the selection of his companions. This dangerous responsibility for the honesty of every man on board is imposed upon him, it is said, for reasons of policy. If it be so, it should be so declared in his contract; it should be made a part of it, and he should distinctly understand that he is not only to be answerable for his own honesty and the full and faithful discharge of his duty, but to make good the losses, which may happen on board the vessel by the fraud or negligence of others; nay that the burden of proof is thrown upon him, to show that the embezzlement was committed by persons not of the crew. If neither he nor any body else knows how the loss happened, nor, if by embezzlement, by whom the fraud was committed, he is to

stand answerable for it, to whatever sum his proportion may amount. Such is the law as laid down in the case of the Kensington, (1 Peters Ad. Dec. 239, 240.)

The reason is not that any such undertaking is found in the contract of the seaman, but in the policy of the law. The same policy would apply to a number of persons employed in an extensive manufactory; where there are the same opportunities to pilfer, the same inducements to fraudulent combinations, and the same reason, if there be any, to presume that they are acquainted with each other's doings. If a sailor is thus to be made the insurer for all the property on board against embezzlement; and, more than this, if he takes upon himself to prove how and by whom the loss was occasioned, before he can throw the burden from himself, he ought to have an adequate premium, an addition to his wages for this extraordinary risk. His wages pay him only for his labour and services.

In the case of the Kensington, the amount of wages was not disputed, but the seamen were charged with a sum, for a loss to the ship, in consequence of the embezzlement of part of a box of cambrics and lawns. It appeared, from circumstances, that the embezzlement took place at the time of lading the ship at Liverpool, though it was not discovered until she was unlading at Philadelphia. Several persons, not of the crew, were hired to assist in stowing the vessel at Liverpool; these had the part of the cargo assigned to them to stow, of which the plundered box composed an article; but the mate and some of the crew were always with them, and the box was in a situation to admit the access of the crew, as well those who assisted the labourers, as any others of the seamen. The box was much injured and broken open with a crow bar or some such instrument, probably used at the time of storage. In that case the crew were ordered to make good the loss by a general contribution. The learned judge, in making this decree, says, "If it could be proved, that the labourers committed the embezzlement, without the participation, connivance, or knowledge of the mariners,

the latter would not be bound to contribute." And this proof is to be made by the mariners, whose answer and defence denies all such participation, connivance, and knowledge, which, in the ordinary course of legal proceedngs, would throw the proof back upon those who would charge them with it. The mariners are to prove that they did not participate; that they did not know or connive at the fraud; and more than this, they must prove who were the offenders; "if it could be proved that the labourers committed the embezzlement;" and further, that it was without their participation. It is true, the judge agrees that if it were proved to have been done by the labourers, he would not consider the mariners liable for them as part of the crew. The judge then distinctly states, "that there is no doubt but that the seamen are answerable for embezzlement, unless they can clearly show, either by positive evidence, or strong circumstances, that it was committed by persons not of the crew. It is," he adds, "impossible for me to say who committed the act in question, in this case; it may have been either a separate or a joint act; it may have been perpetrated by the labourers alone, or in company with some of the crew; but under the uncertainty, I think the law throws the burden of proof on the mariners."

To the law, as thus laid down, I cannot assent. It does not, in my opinion, conform to the general principles of jurisprudence; of right and wrong between man and man; nor to the adjudications of other courts on the subject. No case is cited by the learned judge, or by the counsel of the respondent, to support this doctrine. The law of the English courts is thus given, in judge Story's last edition of Abbott on Shipping, (p. 472.) "If the cargo be embezzled, or injured by the fraud or negligence of the seamen, so that the merchant has a right to claim a satisfaction from the master and owners, they may, by the custom of merchants, deduct the value thereof from the wages of the seamen, by whose misconduct the injury has taken place." Alluding then to the proviso introduced into the agreement made with the seamen, which, he says, is calculated to enforce

the rule he has mentioned in the case of embezzlement, either of the cargo or the ship's stores, he adds, "this proviso, however, is to be construed individually, as affecting only the particular persons guilty of the embezzlement, and not the whole crew. Nor, as it seems, is any innocent person liable to contribute a portion of his wages, to make good the loss occasioned by the misconduct of others."

This appears to me to be the real justice of the case, administered to seamen, as it is administered to others. In the first place, before the master and owner can throw upon the mariners the responsibility which the law throws upon them, the embezzlement or loss must be by the fraud or negligence of the seamen; and, of course, is a fact to be proved either by direct, or satisfactory circumstantial evidence. This being done, the deduction is to be made "from the wages of the seamen by whose misconduct the injury has taken place," which is another fact to be proved by the master or owner; "but no innocent person is to make good the loss occasioned by the misconduct of others."

The learned editor of the American edition of this work, in a note appended to the paragraph quoted, says; "This may be justly stated as the generally received law in the courts of America. Some cases have been decided, in which all the seamen have been held liable to contribution for embezzlement, where there is no reason to impute to them any participation in the act of plunder." He then refers to the case of the Fair American (1 Peters, Ad. Dec. 242) in which judge Peters ruled, that "no one is to be excused from the general contribution, though absent from the ship, and not in a situation to be capable of assisting in the plunder." "The innocence of an individual is not the question, it turns on the joint obligation of all to make retribution." He also refers to the case of the ship Kensington, already noticed; to a manuscript case in the Massachusetts District, which I have not seen; and to the case of Sullivan v. Ingraham. (Bee 182.) In this last case judge Bee does not adopt the principle of judge Peters, although he goes

beyond the English rule. He says, "the general doctrine is, that all are answerable," but that "the court will always endeavour to distinguish between the innocent and the guilty." And he acquitted two of the crew from liability upon presumptive proof that, although on board the vessel, they were not concerned in the embezzlement.

The learned annotator further says, that the doctrine in the text was held to be the correct doctrine in the case of Lewis v. Davis, (3 Johnson, 17.) In that case a bale of goods was shipped at Bayonne; the vessel arrived at New York, direct from that place, on the 17th of October. On the 18th she came to the wharf, and on the 19th the goods were missing. The crew went on shore on the 18th; and returned on board on the 19th. On the night between the 18th and 19th, the fore scuttle was broken open. It was not pretended that any of the crew were concerned in the robbery. Kent, chief justice, delivered the opinion of the court. "Admitting the rule of the maritime law to be, that mariners are to contribute out of their wages to the damages arising from embezzlement by each other, during the voyage, yet if negligence be not imputable to them, and the circumstances of the case do not fix the presumption of embezzlement upon any of the crew, they ought not to contribute." We see here that the preliminary step is to show that the embezzlement was done by the crew or some of them; negligence must be imputable to them; the circumstances of the case must fix the presumption upon the crew or some of them. This is entirely different from the rule of judge Peters, who fixes the presumption on the crew, primâ facie, and throws it upon them to disprove it. Chief Justice Kent proceeds, "the loss ought, in justice, to attach upon the person, to whom the care of the vessel was committed for the night." "Molloy does not state the rule on this subject, with much precision, nor is he of much authority; but he rather seems to place it upon the ground of fault or negligence in the mariners. And even to the limited extent, to which he carries it, in this instance, has been recently questioned or denied by the court of common pleas in the

case of Thompson v. Collins, (4 Bos. and Pull. 347,) who were inclined to think that each person ought to answer for his own default. On the other hand, the mutual responsibility of seamen has been carried to a greater extent in the decrees of the District Court of Pennsylvania; and further, I apprehend, than in any of the marine ordinances annexed to the reports of those respectable decisions. Assuming, however, the rule to the extent, in which it is laid down in Molloy, it is sufficient that the facts, in this case, did not lead to the conclusion that the plaintiff below was chargeable with fault or negligence, or that the embezzlement was to be imputed to any of the crew."

The case of Thompson v. Collins, (4 Bos. & Pull. 347,) referred to Chief Justice Kent, was a suit for wages as a sailor. The facts were, that the ship sailed from Jamaica with several pipes of wine on board, stowed in the fore part of the ship. In the course of the voyage the partition was broken down, by some of the crew, but by whom could not be ascertained. Six of the casks were plugged by some of the crew, but it was not proved that the plaintiff was concerned in the transaction. A deficiency was found in the contents of the casks, of one hundred and sixty-two gallons. The defendant, the owner, paid all the other men their wages, deducting their proportionable value of the wine lost. The question was, whether the plaintiff was entitled to recover. The defendant relied upon the words of the act of parliament, "that each seaman and mariner, who shall well and truly perform the above mentioned voyage, (provided always that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores,) shall be entitled, &c." The court held that these words must be construed respectively to every sailor, who shall plunder, embezzle, or commit an unlawful act. It is proper to say that this was a decision upon the construction of the act of parliament, and a clause in the shipping articles in conformity with it, which forfeited the wages in the cases mentioned, and our shipping articles contain the same clause, but not upon the maritime law authorising a

deduction from the wages of every seaman in case of embezzlement. That question is not, it is true, decided by the court, but Chief Justice Mansfield, after declaring that there is no foundation for a forfeiture of the whole wages, adds, "and I suspect that there is as little for a proportionable deduction; for notwithstanding what is said in Molloy, if such be the rule of law, it is scarcely possible but that it must have been often mentioned in the books, and as well known as any rule of maritime law, since frequent occasions must have arisen for the application of it."

The annotator (Judge Story) also says that the English doctrine was adopted and followed in the case of Spurr v. Pearson, (1 Mason, 104,) which, being his own decision, he cannot be mistaken as to its intention. The learned judge goes into a thorough examination of the subject with his usual ability. His argument is so condensed, that an analysis cannot be made of it without injury to the whole. I shall therefore content myself with giving the result in his own words. "Upon the whole, my opinion is, that the rule of contribution, as contended for at the argument, and as asserted by Valin, cannot be sustained as a general rule of maritime law; that it has not that general sanction, or universal use which entitles it to such a consideration; and that it has not such intrinsic equity or justice, as that, in the absence of direct authority, it ought to be adopted as a limit upon judicial discretion. On the contrary, it seems to me, that the true principles, which are to govern in these cases, are those of the general contract of hire; and that the most, that the maritime law has done, is to enforce these principles, by allowing the owner and master to make an immediate deduction from the wages of the offending parties, instead of driving them to the circuity of an action for damages. The result of this opinion is, that where the embezzlement has arisen from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to it, in proportion to their wages; but when the embezzlement is fixed on an individual, he is solely responsible; that where the embez-

zlement is clearly shown to have been made by the crew, but the particular offenders are unknown, and from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute; but that where no fault, fraud, connivance, or negligence is proved against the crew, and no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master; that in no case is the innocent part of the crew to contribute for the misdemeanours of the guilty; and further that in case of uncertainty, the burthen of the proof of innocence does not rest on the crew; but the guilt of the parties is to be established beyond all reasonable doubt, before the contribution can be demanded."

While I think that the learned judge presses sufficiently hard upon the sailor, and scarcely places his contract upon the principles of "the general contract of hire," I cannot deny that there is in his opinion a combination of good sense, natural justice, and sound law, with as much of commercial policy as justice will bear, which I am willing to abide by. If then we test the case before us by these principles, to what result will they bring us? It is uncertain, in the first place, what amount of dollars was in the bags, more especially in the large ones. I do not mean to intimate any fraud or improper design in this respect; but mistake is not improbable. There was evidently great carelessness in putting it up; it was probably done in haste. The bags were so loose and open, that the money might have been picked out of them, before they were taken to the vessel, or left the store for that purpose. They were carried about a quarter of a mile, and the missing money may have dropped out. In short, it is impossible to say where or how these dollars were lost. When the bags came on board the vessel, they were put in the run; to which there was no fastening. The steward, a stranger, not one of the crew, had constant access to it. No one of the crew was seen to go to the run, and they could not after the vessel sailed. There is, in truth, no one circumstance of suspicion

or presumption against the crew; except that the money is lost, and no one knows what has become of it; no one pretends to know who took it, if the supposed amount was really put into the bags.

Without a recurrence to the principles adopted in the case of Spurr v. Pearson, just recapitulated, it is most manifest, that they would not afford the least warrant for charging the libellants with this loss.

Decree. That the libellants recover and have paid to them their wages, without any contribution or deduction on account of the loss alleged by the respondent.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

AUGUST SESSIONS, 1834.

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WILLIAM S. DAVIS AND GEORGE W. LEHMAN

*v.*

A NEW BRIG.

1. The subject matter of the controversy generally determines the question of admiralty jurisdiction.
2. The provisions of the act of 24th September, 1789, which give to the district courts original cognisance of all civil causes of admiralty and maritime jurisdiction, comprehend all maritime contracts, and those which relate to the navigation, business or commerce of the sea, and the building, repairing or supplying of vessels.
3. Workmen, materialmen, and persons furnishing repairs and necessaries to a vessel, in a port of a state to which she does not belong, have a lien on the vessel, which they may enforce by a suit in rem in the admiralty.
4. Workmen, materialmen, and persons building a vessel, or furnishing her with repairs or necessaries, in a port or state to which she belongs, have no implied lien on the vessel, and cannot enforce one by a suit in rem in the admiralty, unless such a lien is given under the provisions of a state law.
5. Where courts of a state and the United States have concurrent jurisdiction, the mode of trial is to be regulated according to the law, usage and practice of that court in which the suit may be instituted.
6. Where a lien on a vessel is given by a state law, the district court rightfully obtains jurisdiction, and may exercise it; not according to the provisions of the state law, but according to the mode of proceeding in the admiralty.
7. Workmen and materialmen having a lien on a vessel, under the provisions of a state law, have their election to enforce it either in the district court or a state court; but having made their election, the defendant must follow them into the court chosen, and submit to the mode of proceeding and trial used in that court.

8. The lien of workmen and materialmen on a vessel attaches when the work and materials are furnished, and cannot be afterwards divested by the act of one of the parties.
9. Workmen and materialmen having a lien on a vessel, may enforce it before the vessel is finished or sold.
10. Workmen and materialmen having a lien on a vessel, under the provisions of a state law, which makes a vessel liable to them for all debts contracted by the masters or owners thereof for work and materials, do not lose their lien on a transfer of the vessel to another owner, or on a change of the master.
11. A usage, to affect the lien of workmen and materialmen on a vessel, must be clearly and uniformly well known and understood among the parties.
12. Where a libellant, in a suit in rem in the admiralty, establishes a clear legal right to a condemnation and sale, there is no discretionary power in the court to refuse or postpone an order of sale.

William S. Davis and George W. Lehman filed a libel in the District Court of the United States for the Eastern District of Pennsylvania, against a new brig, not completely finished and ready for sea. They alleged that they had, at the request of the owner, between the 6th September, 1833, and the 7th July, 1834, furnished and delivered certain materials, which they enumerated, necessary for the construction of the vessel; and that they had also performed the work and labour necessary for building and equipping the vessel for the purposes of navigation. Their libel was filed for the recovery of the value of these materials, work and labour. Process of attachment being issued, pursuant to the prayer of the libel, the vessel was taken into custody by the marshal. The owner, Jacob Tees, made no answer to the libel, and did not deny any of its allegations, but put in a plea to the jurisdiction of the court, on the ground that the brig being a domestic and not a foreign vessel, the case was not within the cognizance of the court; and that if liable to any proceedings in rem, they must be instituted in the state courts, and under the provisions of the state laws.

On the 24th August, 1834, the case came on to be heard before Judge Hopkinson. It was argued by Hazlehurst for the respondent, and Bayard for the libellants.

HAZLEHURST, for the respondent.

This being the case of work and materials furnished for a domestic ship, the court has no jurisdiction over it by the general admiralty law. The remedy in such a case is derived altogether from the local laws of Pennsylvania. By the act of assembly of 27th March, 1784, at which time the admiralty was a state court, jurisdiction is granted to it for the recovery of debts for work done and materials furnished to any ship or vessel built or repaired within this state; and such vessels are declared to be liable for such debts, in preference to any other debts due from the owner. By the act of assembly passed on the 9th February, 1793, when the admiralty court of the state was abolished, and admiralty jurisdiction was vested in the courts of the United States, the remedies given by the former act for the recovery of debts due for work and labour furnished to vessels, were transferred to the court of common pleas of the state, and a court of admiralty has no power over a case for materials or work on a domestic ship; the remedy ought to have been sought in the courts of the state, according to the law of the state, which gives it. Even if the law of the state shall be considered to give the jurisdiction to this court, then it must be here exercised, under the qualifications and conditions provided for by the act of assembly, according to which all questions of fact are to be tried by a jury. 1 Story's Laws, 56. The General Smith, 4 Wheaton, 438. 3 Kent's Comm. 169.

BAYARD, for the libellants.

This court and the common law courts have concurrent jurisdiction in all cases, except those of prize. This is a case of 'admiralty and maritime jurisdiction,' under the constitution and laws of the United States. That jurisdiction depends on the subject matter.

The act of Pennsylvania of 27th March, 1784, expressly gives a lien. When the legislature of Pennsylvania transferred this remedy for the recovery of these debts, from the court of admiralty of the state, which no longer existed, to the courts of common law, they were bound by the constitution

to call a jury to ascertain any disputed facts in a case; but the constitution of the United States secures the trial by jury only in suits at common law; but not in those at equity or in the admiralty. The General Smith, 4 Wheaton, 438. 443. The Robert Fulton, 1 Paine, 620. The Jerusalem, 2 Gallison, 345. Stevens v. The Sandwich, 1 Peters Ad. Dec. 233.

On the 1st September, Judge HOPKINSON delivered the following opinion:

The libel, in this case, sets forth that at sundry times, between the 6th day of September, 1833, and the 7th day of July, 1834, at the request of Jacob Tees, who was employed in building a new brig on the Delaware river, in the said district, the libellant did provide, furnish, and deliver certain enumerated materials, and did perform certain work and labour for the use of the said brig, which were necessary in the building, fitting, furnishing, and equipping her for her safety, and the navigation of the high seas. Particular accounts of the said work and materials and their cost and value are annexed to the libel. It is further set forth, that although the brig is not yet completely furnished, and has not yet proceeded to sea, nor received any name, whereby to distinguish her, the owners are about to send her out of the district, as the libellants fear, without paying for the materials, work, and labour, furnished and performed by the libellants; and that they have not accepted any other security for their said claims than their liens on the said brig, which they have not consented to release. The prayer is for process of attachment against the brig, and a decree of condemnation for the payment of these claims.

The defendant, Jacob Tees, has put in no answer to the libel, nor denied any of its charges, but leaves the case of the libellants to stand as they have stated it. But assuming or admitting the facts set forth in the libel, he alleges that this court has no jurisdiction over the matter of complaint, to grant the relief prayed for, and ought not to take further cog-

nisance of it, because, that the new brig referred to in the libel has been built at the city of Philadelphia, where the said owner resides; that by an act of the legislature of the state of Pennsylvania, passed on the 27th March, 1784, and a supplement thereto, passed on the 9th February, 1793, it does not pertain to this court, nor is it within its cognisance at all to interfere or hold plea respecting the said brig; but that the said cause of action, if any accrued to the libellants, accrued to them at Philadelphia, within the jurisdiction of the district court of the city and county of Philadelphia, and not within the jurisdiction of the district court of the United States, for the eastern district of Pennsylvania.

The ground of the objection to the jurisdiction of this court is that the brig in question is a domestic vessel, belonging to owners residing in this district, where she was built, and the work and materials for her use furnished; that no lien is given by the general maritime law upon the brig for work and materials so furnished; and consequently that this court has no authority to enforce this claim against or upon the body of the vessel.

The subject matter of the controversy generally determines the question of jurisdiction. The act of congress constituting the courts of the United States, gives to them cognisance of 'all civil cases of admiralty and maritime jurisdiction;' this grant certainly comprehends all maritime contracts; and a contract which 'relates to the navigation, business, or commerce of the sea,' is of that description. In the case of De Lovio v. Boit, (2 Gallison 475,) Judge Story says, that "all civilians and jurists agree that in this appellation (maritime contracts) are included, among other things, contracts for maritime service in the building, repairing, supplying, and navigating ships." In the case of The Jerusalem, (2 Gallison 347,) the same judge repeats this doctrine as to the general jurisdiction of the court of admiralty over all maritime contracts, and, particularly, in favour of materialmen. But it is obvious that this does not decide our case, as the jurisdiction of the court

over the case or claim may be admitted, and the relief now prayed for denied. The proceeding here is in rem, against the brig, and not in personam, against the owners or persons making the contract. This brings us to the question, whether, in the case of a domestic ship built or repaired where the owner resides, materialmen have a lien upon her as a security for their payment, for if they have such lien, there can be no doubt that it may be prosecuted and enforced in this court.

Judge Story, in the case referred to, says that there are great authorities on both sides of the question, though "upon principle, independent of common law authorities, there is not much room to doubt." He adds, that "be this as it may, it cannot affect the question of the jurisdiction of the admiralty in such cases, for that stands altogether independent of the doctrine of liens, and may be enforced as well by process in personam, as in rem."

The supreme court of the United States, the authority which must govern the judgment of this court, has, happily, afforded us a guide for our opinion. I refer to the case of The General Smith, (4 Wheaton, 438.) The ship was an American vessel, and was formerly the property of Mr. Stevenson, a merchant of Baltimore, and a citizen of the United States. Whilst she so belonged to Stevenson, the libellant, a ship chandler of Baltimore, furnished, for her use, various articles of ship chandlery, to equip and furnish her, it being her first equipment, to perform a voyage to a foreign country. The ship departed from Baltimore on the voyage, without any express assent or permission of the libellant, and also without objection on his part, or any attempt to detain her, or to enforce any lien, which he had against her for the articles furnished. She continued to be the property of Stevenson during the voyage, and after her return, and was not sold until the 3d October, 1816, when, being obliged to stop payment, he executed an assignment, to the claimants of his property including the ship for the payment of duties to the United States, and for the satisfaction of other creditors. Another

libel was filed 11th November, 1816, by the administratrix of Thomas Cockrill, deceased, for iron materials and work furnished to prepare the said ship for navigating the high seas.

The district court of Maryland ordered the ship to be sold, and decreed that the libellants should be paid out of the proceeds the amount of their demand for materials furnished. The circuit court affirmed this decree, pro forma, and the cause was brought by appeal to the supreme court.

Mr. Pinckney, for the appellants, admitted the general jurisdiction of the district court, as an instance court of admiralty, over suits of materialmen in personam and in rem, but denied that a suit in rem could be maintained in this case, because the parties had no specific lien on the ship for supplies furnished in the port to which the ship belonged. That in the case of a domestic ship, mechanics have no lien upon the ship itself for their demands, but must look to the present security of the owner. Had the suit been in personam, there would have been no doubt of the jurisdiction, but there being no such local law, or specific lien to be enforced, there could be no cause to maintain a suit in rem.

This is the same ground now taken in support of the plea in our case.

Judge Story, in delivering the opinion of the court, declares, that the admiralty rightfully possesses a general jurisdiction in cases of materialmen; and that had the suit been in personam, there would have been no hesitation in maintaining the jurisdiction of the district court; but that when the proceeding is in rem, to enforce a specific lien, it is incumbent on those who seek the aid of the court, to establish the existence of such lien in the particular case. That in case of repairs or necessaries furnished to a foreign ship, in a port of a state to which she does not belong, the general maritime law gives the party a lien on the ship itself for his security, and he may well maintain a suit in rem in the admiralty to enforce the right. But in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed by the municipal

law of the state; and no lien is implied unless it is recognised by that law. These doctrines, so clearly explained, are confirmed by the same court in the case of Peyroux, v. Howard, (7 Peters, 324.)

The law of the case being thus settled, the question that remains for us is, whether by the local law of Pennsylvania, the libellants have a lien on the brig libelled, for the satisfaction or security of their claims. Of this there seems to be no possible doubt, either on the words of the act of the legislature of the state, or the unvaried practice under it, by which proceedings, in the manner prescribed by the act, have been prosecuted in rem, against the body and tackle of the vessel, from the time of passing the law to the present day.

By the act of 27th March, 1784, it is enacted, that "ships and vessels of all kinds, built, repaired and fitted within this state, are hereby declared to be liable and chargeable for all debts contracted by the masters or owners thereof, for or by reason of any work done or materials found or provided by any carpenter, blacksmith, mast-maker, boat-builder, block-maker, rope-maker, sail-maker, rigger, joiner, carver, plumber, painter or ship-chandler, for, upon and concerning the building, repairing, fitting, furnishing and equipping such ship or vessel, in preference to any and before any other debts due and owing from the owners thereof." If any thing can add any strength to this language in creating a lien, it will be found in the circumstance that the language used in the New York statute, on the same subject, is substantially the same, declaring that the vessel shall be liable, and no doubt has been entertained, in the construction of that statute, that it gives a lien. These observations are made, although they may seem unnecessary, because it has been said in the argument for the defendant, that the act of Pennsylvania does not raise a lien for the materialmen, but only gives them a preference over other creditors. This law of Pennsylvania was passed antecedent to the adoption of the present constitution of the United States, and when the state had her own court of admiralty, and directs that the libel

shall be filed in that court against such ship or vessel, and her tackle, "whereupon process shall issue, and such proceedings shall be had as are usually had in the courts of admiralty for the recovery of mariners' wages, and other debts actually contracted upon the high seas, and within the jurisdiction of the court of admiralty." So the law of Pennsylvania stood for the creation of the lien, and the manner of enforcing it, when she had a court of admiralty. By the constitution of the United States, and the provisions of the judiciary act, passed in pursuance of it, cognisance was given to the courts of the United States, of 'all cases of admiralty and maritime jurisdiction,' and the state admiralty courts ceased to exist. It became necessary for Pennsylvania, still believing that "the business of ship-building was a very important branch of the commerce of the state," to provide some other jurisdiction and means for "securing the persons employed in building and fitting ships or vessels for sea, by making the body and tackle of such ships and vessels liable to pay the several tradesmen, employed in building and fitting them, for their work and materials." A law was therefore passed on the 9th February, 1793, enacting that the libel authorised by the former act to be filed in the court of admiralty of this state, may be filed in the office of the prothonotary of the common pleas of the county, who is to issue an attachment directed to the sheriff, to arrest and detain the vessel, and the court is to take stipulations. Thus the whole proceeding to enforce this lien is transferred from the admiralty to a common law court, in which questions of fact have always been tried by a jury, and the constitution of Pennsylvania expressly declares that "trials by jury shall be as heretofore." In conformity with this declaration, the act of 9th February, 1793, instead of directing, as the former act did, that "such proceedings shall be had as are usually had for the recovery of mariners' wages," provides that "where, in any cases occurring under the said act, questions of fact shall arise, an issue or issues shall be joined by the parties under the direction of the court, and shall be tried by jury."

The argument, then, of the defendant in this case, in support of his plea to the jurisdiction of the court, is reduced to this; that as this court has cognisance of the case by reason of the lien given by the local law of Pennsylvania, the jurisdiction of this court must be governed and exercised according to the provisions of that local law, and as it is exercised by the courts of Pennsylvania; that is, by a trial of questions of fact by a jury. Now if this argument were sound, it would not support the plea of the defendant, which objects, not to the course of proceeding in this court; nor to the mode of trial; nor suggests that there are any questions of fact for a jury to pass upon; but broadly to the entertainment of the suit by this court in any way, or by any mode of trial. But the argument is not sound. When Pennsylvania had her court of admiralty, to which cognisance of these cases was given, she said nothing, in her act giving this lien and prescribing the manner of enforcing it, of a jury, but the whole proceeding and trial were to be had according to the usage of the admiralty courts for the recovery of mariners' wages, and other debts actually contracted on the high seas. When her court of admiralty ceased to exist, and she was desirous to continue this security and remedy to mechanics and tradesmen furnishing work and materials for a ship, she was obliged to bring them into her common law courts, and, of course, to conform the proceedings and trial to the usage of those courts. But when the case comes rightfully into a court of admiralty, it is to be conducted, tried and decided according to the usage and practice of that court. This court obtains its jurisdiction over the case, not by any grant, express or implied, from the legislature of Pennsylvania; that could not be: but incidentally, as a consequence of the lien, given by the local law of that state, upon the vessel for the satisfaction or security of the debt or claim of the libellants. The jurisdiction being thus rightfully obtained over the claim or cause of action, it must be exercised, not as such a claim would be prosecuted in the state court having also jurisdiction over it, but in the manner in which cases are prosecuted and tried in a maritime

court. Each court exercises its jurisdiction in its own way, according to its own law of proceeding. The jurisdiction is concurrent; the mode of trial to be regulated by their respective usages and practice. So it is in other cases. The common law courts of the state have a concurrent jurisdiction with the maritime courts of the United States for the recovery of seamen's wages, for damages for assaults and batteries, and other trespasses committed on the high seas. If the party in such a case goes into a state court, his cause is tried by a jury, as other cases are tried there; but if he comes into the admiralty, he must submit himself and his cause to the judge, because such is the law and usage of that court. So the mechanic or materialman, who has built, repaired, or furnished supplies for a ship, has his election, in Pennsylvania, to go into the state court, or into the district court of the United States, to prosecute and recover his claim; and, having made his election, the defendant must follow him into the court he has chosen, and both must submit to the course of proceeding and trial used in that court.

The Plea to the jurisdiction was overruled.

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The plea to the jurisdiction having been overruled, the respondent put in an answer to the libel, to which there was a general replication.

The answer admitted the amount claimed by the libellant, Davis, but denied the amount claimed by the libellant, Lehman; upon which, evidence was given in support of the account. The respondent also alleged a special agreement, set forth in the answer, according to which, it was declared that the vessel was built on a speculation, and that the mechanics employed upon her, as well as the persons furnishing materials, agreed that she should be sold for the benefit of all concerned, when she was finished; and, therefore, that the libellants had relin-

quished their right to proceed against her, and force a sale for their own advantage, before she was completed.

Evidence was offered to sustain this allegation; but it failed to do so. The counsel of the respondents admitted that the special agreement had not been established, and that the disputed account had been well proved.

HAZLEHURST, for the respondents.

1. The contract is not such as will give the claimant a lien, under the act of assembly of Pennsylvania. 2. If it be such a contract, it must be construed with reference to the custom of the port. 3. The court will not decree a sale, where it is apparent it will produce a sacrifice of the property. It is altogether a question for the discretion of the court.

By the act of 27th March, 1784, (2 Smith's Laws, 95,) it is enacted, "that ships and vessels of all kinds, built, repaired and fitted within this state be, and they are hereby declared to be, liable and chargeable for all debts contracted by the masters or owners thereof." It is contended that the respondent, Jacob Tees, was neither master nor owner of this brig; that the contracts in question were made with and by him, and the debts were due from him to the libellants. In this case, a sale has been made of the brig, after the materials furnished, to Charles Harper and others. The argument is, that they are the present owners of the brig; that no contract was made with them; and that Tees, with whom the contracts were made, is not the owner. Collings v. Hope, 3 Washington, 149. Stultz v. Dickey, 5 Binney, 287. Steinmetz v. Boudinot, 3 Serg. & Raw. 541.

BAYARD, for the libellants, in reply.

This is a right claimed under an act of assembly, which specifies exactly the circumstances in which it arises. They are two. 1. The debt must be contracted with the master or owners of the vessel. 2. It must be for work done, or materials furnished, by a person within the several classes specified in it. These libellants are within the description; they contracted with the respondent, who was the owner at the time of

the contract; they worked on the vessel, and furnished materials for her. There has been no evidence of any usage by which their claim was impaired; but if there were any, it could not operate to deprive them of a remedy given by law; they must have assented to such an effect; but there is no circumstance showing either an express or implied assent. As to the exercise of a discretion by the court, which is to deprive these workmen of a legal remedy, no ground for it has been shown, and it would require a case of extreme necessity to justify it.

On the 16th September, Judge HOPKINSON delivered the following opinion:

The objections to the account of George W. Lehman, are withdrawn, and it is agreed that no proof has been given to support the special agreement alleged in the answer.

Other questions of law have been raised to defeat the claim of the libellants, at least, in this mode of proceeding. It is alleged that, by the act of assembly under which the lien is claimed, and without which no proceeding can be sustained against the body of the vessel, this suit cannot be entertained, by the court, in its present form. That it now appears that the brig was sold by the respondent, Jacob Tees, who built her, to Charles Harper and others, who are now the owners; that with them no contracts for these materials were made by the libellants; and that Tees, with whom the contract was made, is no longer the owner, nor was he so, when this libel was filed. On these facts it is contended, that, as the act of assembly gives the lien or charge upon the vessel, only for the payment or security of debts contracted by the masters or owners thereof with the mechanics and materialmen, and as no such contract was made with the present owners, the provisions of the act of assembly do not apply to this case. The injustice of this argument is so manifest and the frauds it would sanction so destructive of the objects of the law, that I could not hesitate a moment to reject it. Jacob Tees, the builder and owner of this brig when the contract was made, is the claim-

ant and respondent to this libel; he is the party disputing the right of the libellants in this court. He does not deny his ownership, or put that fact in issue; on the contrary he claims the brig as her owner. But independently of this state of the case on the face of the pleadings, can it be supported that the lien and security given by the act of assembly to mechanics who build a vessel, and to the men who furnish the materials of which she is constructed, may be lost and defeated by a transfer of the vessel by the owner, with whom they did make their contracts, and to whom they did furnish their work and materials, to a stranger with whom they had no contract or dealing? Can they, in this way, be turned from the person, with whom they did contract, to one they had nothing to do with? Can they, by an act of the other party, to which they were not consenting or privy, be deprived of the substantial security on the body of the vessel given to them by the law, and be turned over to the personal responsibility of a man who may not be worth a farthing? The person, with whom they made their contracts, replies, I am not the owner of the vessel; and the owner says to them, I am not the person with whom you made the contracts. When the act of assembly speaks of masters and owners of a vessel, it is most manifest it intends the masters and owners at the time the contract was made, the work done, or the materials furnished, and not those who might afterwards become so. The lien on the vessel attached when the materials were furnished, and it cannot be afterwards divested by the act of one of the parties. In this case the ownership of Tees continued until after the brig was launched; until that time the sale to Harper was contingent, and the right of Tees in her as her owner was full and complete.

If this construction of the act, upon a change of the owners of a vessel, be sound, the same must be applied to a change of the master; and has it ever been suggested that the lien of a contract, made with the master of a vessel, is lost by the appointment of a new master?

Now as to the custom alleged in this case, to sustain this

part of the defence, it was incumbent on the respondent to show one clearly and uniformly well known and understood, so that it must be presumed to have been part of the contract between the libellants and respondents, that the mechanics and materialmen of a vessel built in this port on speculation, are bound, by virtue of the custom and without any express agreement or understanding to that effect, to wait for the payment of their debts, until the vessel is finished and sold; and to forego and postpone all legal remedies and proceedings, for the recovery of their claims, until she is sold. No witness has testified to any such usage; on the contrary, the evidence rather gives a negative to any such pretension. The fair result of all the testimony upon this point is, that there is a sort of understanding that in such a case, that is, of a vessel built for sale, or, as it is called, on speculation, the mechanics and materialmen will not press for their debts until she is sold, because it is for their own advantage. It is an acquiescence in the delay of payment for their own advantage, and not by or under any obligation on their part, or any contract implied with their employer. No witness has said or suggested that, in such a case, the materialmen are bound by any usage or understanding of the trade, not to sue for their debts, or that they have abandoned or surrendered any of their legal rights or remedies, or given up their claim or lien on the vessel, or any other security for their debts. All beyond this must be the subject of a special arrangement or contract between the builder and the persons from whom he obtains his materials or labour.

A number of witnesses have been produced to support this part of the defence; to wit, John Vaughan, Mr. Vandusen, W. Vanhorn, Samuel Green, John W. Eyre, with others; all experienced ship builders, or concerned in furnishing ships. Mr. Eyre said, "when a vessel is built on speculation, the understanding is, that the materialmen are to wait until she is sold." On a question from the court, in relation to a vessel built by himself on speculation or for sale, "my understanding was, that

the materialmen were to wait a reasonable time to sell the vessel. I made an agreement with one of the men to wait six months." This is very different from the assertion of an uniform obligatory custom, which binds the materialmen to wait for the sale of the vessel, before they can claim a payment of their debts. But Mr. Eyre adds, "I think the materialmen do not give up the vessel." If he is right in this opinion, and it can hardly be questioned, it is absolutely destructive of the custom set up; entirely inconsistent with it. If these debts are not to be paid until the vessel is sold, and they are to be satisfied from the proceeds of the sale, it is clear, that this fund cannot be received until the vessel is delivered to the purchaser without incumbrance; and, of consequence, that she passes into the hands of the purchaser clear of the liens of the mechanics and materialmen, who will have only the personal security of their employer for their debts, and must depend altogether upon his ability or integrity to appropriate the money received by him to the discharge of their claims. Every witness rejects this consequence, and, of course, denies the premises from which it must follow. Other objections have been made to this custom, and counter evidence was produced, which it is unnecessary to examine, as, in my opinion, the testimony of the respondent entirely fails to support it.

Nothing remains but the appeal to the discretion of the court, not to order a sale when, from the pressure, as it is said, of the times, a sacrifice of the property will be made. I have no such discretion. The rights and remedies of a creditor, against the person or property of his debtor, are given to him by the law, and a judge has no power to resist them on speculative opinions concerning their effect. If they are denied, or interrupted, or delayed, it must be by the law, and not by the discretion of the judge; unless when the law imparts such a power to him. The sales by the sheriffs are not stopped by the courts for such reasons. We see every day sacrifices of property to a vast extent. If the pressure of the times distresses the debtor and depreciates his property, it also reaches the creditor, and

makes it the more necessary for him to collect the debts that are due to him; and prevent, perhaps, a sacrifice of his own property to satisfy his creditors. This appeal for indulgence, if I had the power to afford it, could not prevail in this case. We have no explanation of the real situation or object of this sale of the brig by Tees to Harper. If it is a real bonâ fide transaction, and Mr. Harper has truly paid to Tees the purchase money, why has not Tees paid with it the just and undisputed claims of the libellants? He is the party respondent before the court, and the claimant who takes defence, and prays for this forbearance. On the contrary, if Mr. Harper has not paid the consideration money of the purchase, why does he not at once come forward and pay these claims, and take his credit for them in his settlement with Tees?

Decree. That the vessel be condemned and sold according to the prayer of the libel.

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## Jesse Delano, Junior
## v.
## John Scott.

1. The provisions of the sixth section of the act of 21st February, 1793, are intended to declare the defence that shall be available to a party charged by a patentee with a violation of his right.
2. The provisions of the tenth section of the act of 21st February, 1793, apply only to cases in which a patent has been obtained by fraud, surreptitiously, or by false suggestions, and are intended to protect the public from imposition.
3. Though a patentee believes himself, bonâ fide, to be the original inventor of the improvement patented, yet the fact of his not being so, if it does not constitute a false suggestion in obtaining it, appears to be a sufficient ground for repealing it.
4. The mere existence of a previous patent or specification of an improvement

is not sufficient to establish the fact of fraud in a subsequent patentee of a similar improvement; actual knowledge of it must be proved.

5. If there be a false suggestion in any of several material facts set forth in a specification, the patent is invalid.

6. An order, on a rule to show cause why a scire facias should not issue to repeal a patent, is merely a preliminary proceeding, and does not determine the question of the validity of the patent.

7. An exemplification of a patent afterwards surrendered and cancelled, may be given in evidence to show that an improvement, subsequently patented, is not original.

8. A mere workman, employed by a person who is not the patentee, to make parts of a patented machine, is not liable to a penalty under the provisions of the act of 21st February, 1793.

9. A mere difference in the manner and form of applying an invention, which is the same in principle with one previously used, will not justify a new patent.

10. A judgment against a patentee, on a scire facias issued to obtain a repeal of a patent, vacates the same; but a judgment in his favour will not prevent his right being contested in a suit he may subsequently institute for its violation.

This was a suit brought by scire facias, for the purpose of repealing a patent obtained by the defendant from the United States, under which he claimed the sole and exclusive right of using and vending to others, certain improvements in making iron chests or safes. This patent the plaintiff alleged he had obtained surreptitiously and on false suggestions.

The original proceedings in the case were as follows. On the 29th October, 1833, the plaintiff appeared before the district judge of the United States for the Eastern District of Pennsylvania, and on his oath declared and complained; that the defendant, who was a resident of the district, had, on the 12th November, 1830, and within three years from this application, as well as within three years from the issuing of the patent in question, obtained the same from the United States; that it purported to secure to him the right above stated for fourteen years from the date thereof; that it was obtained by the defendant surreptitiously and on false suggestions; that he was not the true inventor of the improvements described in it; and therefore praying that a rule might be granted, calling on the defendant to show cause why process should not be issued, for

the purpose of repealing the patent, according to the provisions of the act of congress, in such case made and provided.

On the 14th March, 1834, this application was argued by PERKINS for the plaintiff, and EARLE for the defendant.

On the 21st March, Judge HOPKINSON delivered the following opinion:

The affidavit of the complainant in this case was made on the 29th day of October, 1833, and set forth, that the defendant, John Scott, within three years antecedent to the date of the said affidavit, to wit, on the 12th day of November, 1830, had obtained, from the United States, a patent, to secure to him for fourteen years the sole and exclusive right to vend to others certain improvements in making iron chests or safes; that this patent was obtained by the said Scott surreptitiously and upon false suggestions; and that the said Scott is not the true inventor or discoverer of the said improvements. Upon this affidavit a rule was granted, calling upon the said Scott to show cause why process should not issue to repeal the said letters patent. The rule was duly served on the defendant, and he has appeared, by his counsel, to show cause against the issuing of the process demanded.

The affidavit contains two allegations, distinctly made. 1. That the patent in question was obtained surreptitiously and by false suggestions. 2. That the patentee is not the true inventor or discoverer of the improvement patented.

To maintain these allegations, the complainant has given in evidence a patent granted to himself for the same improvements, as he avers, dated on the 7th March, 1826; and also the depositions of several witnesses to prove the identity, at least, substantially, of the improvements patented in the two patents, and also to show the fraud of the defendant in obtaining his patent. These witnesses swear, in general, that the improvements are substantially the same, and particularly describe both. They also testify, that the defendant, Scott, was employed by the complainant as a workman in doing the iron work of these chests, for about

two years, having, during that time, had free access to all parts of the work carried on in the shop, and there become acquainted with the business of making iron chests and safes, and with the peculiar method of saturating the wood with certain materials, so as to render it incombustible. Other circumstances are detailed, which need not be repeated now, to show that the patentee got his whole knowledge of the improvements in question by working in the shop of the complainant, and there seeing the manner in which his iron chests were prepared and made. No evidence was produced, on the part of the defendant, to rebut or explain the inference that would be drawn from these facts, to wit, that when he took out his patent he knew that he was not the inventor or discoverer of the improvements he claimed and patented. Nor has he given any testimony of persons skilled in the manufacture of the article in question, to show that his manner of preparing and making these chests is not substantially and truly the same, with that before used and patented by the complainant. If the alleged improvements in both patents are the same, and if the defendant acquired his knowledge of them by working in the shop of the complainant, where they were made, then the whole case of the complainant is made out, to wit, that the defendant is not the true inventor or discoverer of the thing he has patented, and that he did obtain his patent surreptitiously and by false suggestions, by swearing to that which he knew to be untrue. This is not the stage of this proceeding when I am called upon definitively to affirm or deny either of these allegations: they are questions of fact on which the defendant has a right to the opinion and verdict of a jury of his country, on such evidence and arguments as it may hereafter be in his power to offer to them. Having already acted on the opinion, that the matter alleged in the complainant's affidavit was sufficient to grant the rule upon the patentee to show cause why process should not issue against him, to repeal his patent, I have only now to decide whether he has shown such cause, and removed the effect of the complainant's affidavit. I think he has not done so; on the contrary, he has offered no

evidence to repel, or weaken, or discredit the allegations of the complainant, who has strengthened himself by the depositions of several witnesses. I repeat that the whole case is nevertheless open to the defendant; he may reserve his defence for the future inquiry before a jury, and will not then be prejudiced by any omissions on his part, at this incipient hearing, or by any opinion I may express of his case as it now stands.

Some questions of law, on the construction of the tenth section of the patent law of 21st February, 1793, have been mooted in the argument of the case, which I will briefly notice.

If I were called to give a construction, for the first time, to this section, I confess I should have some embarrassment to reconcile and satisfy all its parts. But happily this section has been carefully and critically examined, not only by a learned judge of the supreme court of the United States in his circuit, (Stearns v. Barrett, 1 Mason, 153,) but afterwards by that court itself, (Ex parte Wood, 9 Wheaton, 603.) The decisions of that court on the doubtful points in this law, not only bind me by their authority, but entirely satisfy and accord with my own judgment. They give the fullest justice to the parties interested, while they do no violence to any part of the act, but make all its provisions consistent with each other, and with the general principles of justice and law. The following points seem to me to be the settled construction of the section in question. 1. That the proceeding given by it, to procure the repeal of a patent, applies only to cases in which the patent has been obtained by fraud, surreptitiously, by false suggestions, by some wilful misrepresentation and deception. The mere fact that the patentee was not the original inventor of the thing patented, is not such a false suggestion as is contemplated by the act, although there are some words in it which seem to favour that construction, provided that the patentee, bonâ fide believed himself to be the true inventor, when he applied for and received his patent, and did not know of any antecedent use and invention of the thing claimed by him. There must be an intended deception and fraud upon the govern-

ment and the public; a wilful wrong to the true inventor. (post p. 501.) 2. That the hearing, on the return of the rule to show cause, is merely an initial proceeding, for a more full and deliberate examination and trial of the cause of complaint, if, in the opinion of the judge, there shall be a good and sufficient ground laid for such further examination; that the order of the judge, on this hearing, cannot be that the patent is invalid, but only that process shall issue for a trial of its validity; and it is upon such trial that the question of validity is to be determined, or an issue to be made between the parties, and the letters patent to be repealed by the judgment of the court, if the issue shall be decided against the patentee. 3. That on the return of the process issued on the rule, the parties will make up their issue according to the case in controversy; and the trial will be by a jury or the court, according as the issue shall present a question of fact or of law. The decision against the patentee will repeal and vacate his letters patent, but a decision of this issue in his favour will give no strength or confirmation to them, to prevent his right from being contested and tried in any suit he may afterwards bring for a violation of it. The summary proceeding under the tenth section was probably given to protect the public from manifest frauds, in taking out patents, (the fees of office being no check,) for known and common things. The imposing appearance of the patent would deceive the timid and ignorant, who might believe it was conclusive evidence of right, or who might be unable or unwilling to take upon themselves the hazard, and the certain loss of time and money, in which they would be involved by litigation. They would, therefore, wisely prefer to pay something for the peaceable use of the pretended invention. Such frauds have been, more than once, successfully practised.

It is ORDERED, that the rule in this case be made absolute; and that process issue, in nature of a scire facias, to the patentee, to show cause why the patent should not be repealed, with costs of suit.

On the 2d May, 1834, the writ of scire facias issued, to which the defendant subsequently pleaded not guilty, with leave to give the special matter in evidence.

On the 27th May, 1835, the case came on for trial before Judge Hopkinson and a special jury. It was argued by Perkins, for the plaintiff, and Earle and Dallas, for the defendant.

Perkins, for the plaintiff.

This suit is a proceeding under the tenth section of the act of congress of 21st February, 1793, (1 Story's Laws, 303,) directing the manner in which a patent may be repealed, if it has been obtained surreptitiously or upon false suggestions. The plaintiff invented a mode of making iron chests so as to render them incombustible. On the 7th March, 1826, he took out a patent for his improvements, which are detailed in his specification. In October, 1827, Scott, the defendant, came to work in the plaintiff's shop, who was then making iron chests according to his patent. He remained working in this shop until September, 1829, when he went to Ohio. He returned to New York in about a year. The plaintiff had heard in the mean time that he had been making iron chests; he charged him with it, but he denied it. He was then allowed to go over the factory. He went away, declining employment by Delano, and came to Philadelphia where he set up a manufactory of iron chests the same as those made by Delano. In October, 1830, he took out his patent for them, making the usual affidavit. It is to repeal this patent, as having been obtained surreptitiously and by false suggestions, that this proceeding has been instituted.

The affidavit of Scott, made before Alderman Badger on the 29th October, 1830, was then read. In this he swears that he believes himself to be the true and original inventor of the improvements within specified and described; and that the same, to the best of his knowledge and belief, had not been known or used either in this or any foreign country.

The counsel for the plaintiff then stated in detail the improvements claimed by Scott, amounting to ten. He then

offered a certified official copy of a patent taken out by the plaintiff, which was afterwards surrendered and cancelled on account of a defective specification; and a new patent obtained on 13th August, 1834. This cancelled patent was offered to show that Scott's first specification had been previously patented; it was to be followed by evidence of its use in the plaintiff's shop when Scott worked there.

EARLE and DALLAS, for the defendant.

We object to this evidence. The paper is imperfect. We should know when it was cancelled; how and for what defect or reason. If the plaintiff can show that he had used potash in New York, and that Scott knew it, that is sufficient without this paper. He should first show that Scott knew the existence of this paper.

PERKINS, for the plaintiff, in reply.

By the third section of the act of 21st February, 1793, (1 Story's Laws, 302,) "certified copies are competent evidence in all courts when any matter or thing, touching a patent right, shall come in question."

Judge HOPKINSON delivered the following opinion:

I admit the evidence. The plaintiff is to prove two things; 1. That Scott is not the inventor of the improvement in question. 2. That he obtained his patent surreptitiously. To prove the second point, he must show knowledge of the defendant, that he was not the inventor; though he need not do so to prove the first. This evidence is good for the former purpose, that is, to show he was not the original inventor. The copy offered proves the existence of the original in the department of state.

PERKINS, for the plaintiff, in continuation.

All the specifications of Scott's patent show that none of them were his inventions. A great number of witnesses examined, all show that these improvements were in Delano's patent; that they were used by him before Scott's application for a patent; and that Scott had full knowledge that they were so used.

They further prove that Scott's first knowledge of the business was obtained in Delano's shop; he was entirely ignorant of every part of it when he came there.

Thomas Archbold, being offered by the plaintiff as a witness, was sworn on his voire dire. He said he had made springs to the bolt, such as are described in Scott's patent.

EARLE and DALLAS for the defendant object.

The witness is not competent; he has an interest in the event of the suit. If, by this verdict and judgment, Scott's patent should be affirmed, it might be given in evidence against the witness in a suit for infringing the patent; he has, therefore, an interest to destroy it in order to secure himself. Scott might sue on his patent, even if the verdict and judgment here should declare it invalid. Agents who vend a patented article are liable to damages. The witness has admitted that he has violated the patent; and is, therefore, liable for damages. He cannot be permitted to take away from Scott the capacity to sue him. Hayes v. Grier, 4 Binney, 83. Conrad v. Keyser, 5 Serg. & Raw. 371.

The witness, being called back by the judge, says, that he has made these bolts in the shop of Mr. Delano, as one of his workmen.

Judge HOPKINSON stopped the counsel for the plaintiff, who was about to reply.

On general principles I should think the evidence admissible. To exclude it, the interest of the witness should be more certain and immediate; not so contingent, remote, and dubious. The possibility that an action might be brought against him, in case his testimony should not prevail, or the tendency of his testimony to render his liability less probable, would not exclude him; it may affect his credit, but not his competency. (1 Starkie Ev. 86, 88.) But it is clear to me that the witness would not be liable to any damages for the violation of Scott's patent, should it be found to be a good and valid one. He is not within the terms of the fifth section of the act. It is there enacted, "that if any person shall make,

devise, and use, or sell the thing so invented, he shall forfeit and pay to the patentee." In my opinion, this description does not, and was never intended, to embrace every workman who may be employed in making parts of a patented machine; nor one who may sell them as the shopman or clerk of another. The maker and seller intended by the act, is the principal who employs these subordinate agents; the person for whom, by whose direction, and on whose account, the machines are made and sold; the person who receives the profit of the sale; he is the seller and the maker. It is he who claims title and property in the thing, and who undertakes to transfer it to the purchaser. The workmen employed by him for stipulated wages, have nothing to do with his right, or with his invasion of the rights of another. They work under his direction, and sell on his account. There may be a dozen or more mechanics employed in making one machine; and several attending in the shop where it is sold. Is each of these liable for damages, that is, to forfeit and pay to the patentee a sum at least three times the price for which the patentee has usually sold his invention? If this be the law, the patentee would recover for every invasion of his right, for every machine made and sold, not three times but fifty or an hundred times the price of it; although no one of the defendants made the machine, but it was the joint work of all. The witness now offered, and objected to, made nothing but the spring bolts of the chests. So as to the persons who may sell it, as the shopmen or clerks of the owner. In common parlance, as well as in the understanding of the law, the seller of an article is the owner for whom it is sold; not the man or boy in the shop who delivers it to the buyer and receives his money. If sold on credit, the buyer becomes the debtor of the owner, of the master of the shop, as the seller.

Perkins, for the plaintiff.

The evidence being closed on both sides, the case was argued by the counsel for the plaintiff, who cited Odiorne

v. Winkley, 2 Gallison, 51. Stearns v. Barrett, 1 Mason, 153. 171. Evans v. Eaton, Peters C. C. Rep. 342. Same case, 3 Wheaton, 454. Ex parte Wood, 9 Wheaton, 603.

EARLE and DALLAS, for the defendant.

The evidence of the case shows, that some of the improvements introduced by Scott, were new and useful; but the main question is not, whether he was or was not the inventor of them or any of them; but whether he has falsely and surreptitiously taken a patent for that of which he then knew he was not the inventor. Evans v. Eaton, Peters, C. C. Rep. 342.

Judge HOPKINSON delivered the following charge to the jury:

The issue you are now trying, is made under the provisions of the tenth section of the act of 21st February, 1793. The question is on the repeal of the patent granted to the defendant; you will observe that a patent may also be annulled under the sixth section of this act. By the terms of that section, if the specification of the patentee does not contain the whole truth relative to his discovery; or contains more than is necessary, for the purpose of deceiving the public; or if it was not originally discovered by the patentee; or he had surreptitiously obtained a patent for the discovery of another person, judgment shall be rendered for the defendant, and the patent shall be declared void. Under the tenth section, the patent will also be repealed, if the patentee was not the true inventor of the thing; or had obtained the patent surreptitiously. These sections, however, are essentially different in their objects and provisions. The sixth section declares the defences that shall be available for a party against whom a patentee has brought suit for the invasion of his right; but no process or means are given for the examination of a patent right, however false and fraudulent it may be, if the patentee will be content to forbear to bring a suit against those who use it. He may thus avoid all examination of his right, and he may go on imposing upon the ignorant or timid, and lay his unjust contributions upon them. A case is recorded of a patent for using the

common stone coal in a common blacksmith's forge. The patentee went through the country exhibiting his parchment patent with the great seal of the department of state, and the signatures of the high officers of government appended to it. This would naturally alarm an ignorant smith, and as the patentee would sell him a right for two or three dollars, or for whatever he could get for it, a prudent man would prefer paying so small a sum, rather than go to law with an adversary apparently so well armed. To protect the public from such impositions, this tenth section was enacted, and gives the power to any person, interested or not in the discovery or the patent, to call upon the patentee for an examination of his right, and have it repealed, if it shall be found that he is not entitled to it. This proceeding, however, must be instituted within three years; for if the public acquiesces for that period in the claim of the patentee, it shall only be questioned by one against whom a suit is brought for a violation of it, when the defendant will always have the benefit of the defence provided for him by the sixth section of the act.

With this explanation of these sections of the patent act, you will inquire whether the specifications contained in Scott's patent, or any of them, are substantially the same with those used in Delano's chests, or in any other chest, French, English or German, antecedent to Scott's patent, and to his claim of invention. I say substantially, for a difference in the manner or form of applying the invention, if it be the same principle, will not justify Scott's patent. I have also said, 'or any of them,' for the petition and oath claim all and each of them; and if there be a false suggestion in a material fact, the patent is invalid. So, on another settled principle of law, he must not patent more than his invention, or all is invalid. If you shall think that all or any of Scott's specifications were used before by Delano, or any other person, his patent can give him no title to them.

But you have to inquire into another question here. Did the defendant obtain his patent "surreptitiously or upon a false suggestion?" If he knew that Delano, or any other person, had

previously used his pretended inventions, he certainly obtained his patent by falsely suggesting that he was the inventor. An important question on the construction of this section of the act here presents itself: whether the mere fact that the allegation or suggestion of the patentee was false; that is, that in truth he was not the inventor, when he alleged that he was; will be sufficient to warrant a verdict and judgment against him, repealing his patent, in this proceeding: or, whether the complainant must not go further, and show that the defendant knew that he was not the inventor, and of course knew that his allegation was false, and therefore wilfully deceived the government and the public in obtaining the patent. When the application in this case was made to me, in March, 1834, for a rule upon the defendant to show cause why process should not issue to repeal his patent, the question now proposed was not much attended to. The argument was more on the mode of proceeding than the merits of the case. In the opinion (ante p. 493) I then said, that I considered it to be the settled construction of this section "that the proceeding given by it to procure the repeal of the patent, applies only to cases in which the patent has been obtained by fraud, surreptitiously, by false suggestions, by some wilful misrepresentation and deception. The mere fact that the patentee was not the original inventor of the thing patented, is not such a false suggestion as is contemplated by the act, (although there are some words in it which seem to favour that construction,) provided that the patentee, bonâ fide, believed himself to be the true inventor, when he applied for and received his patent, and did not know of any antecedent use and invention of the thing claimed by him. There must be an intended deception and fraud upon the government and the public; a wilful wrong to the true inventor." On a further consideration of the subject, I am led to doubt the correctness of this opinion; indeed, it is but one of several difficulties which occur, in reconciling the different parts and provisions of this law. The first part of the section unequivocally requires that the oath or affirmation, which is the commencement of the pro-

ceeding, the very foundation of the complaint, shall affirm that the patent "was obtained surreptitiously or upon false suggestions." If I were left to give a meaning to these words alone, with nothing more in the act to show the intention of the legislature, I should adhere to the opinion that the falsehood alluded to was a known and wilful untruth, the fraud a surreptitious application, a designed and wilful deception. But when the process has been issued on this affidavit, and the parties appear here, the one to maintain his complaint as set forth in the affidavit, and the other to defend himself against that complaint, which is, that he obtained his patent surreptitiously or by false suggestion, we find the ground of inquiry much widened, and this court is directed to render a judgment for the repeal of the patent, "in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer." The manner of obtaining the patent, whether by fraud and falsehood, whether bonâ fide or surreptitiously, is left out of the case, and it is your duty and mine to repeal the patent on the grounds I have mentioned.

While this obscurity in the law has brought me to doubt the construction I formerly gave to it, I shall nevertheless instruct you, in your consideration of this case, to take the law to be as I held it on the application for this process. I must presume that the defendant has prepared his defence on the law as I then laid it down, and it would be unjust to place him on a worse footing now. He shall have the benefit of my mistake, if it was one, and the other party will have the opportunity, should it be necessary, to have the question more deliberately argued and decided, by this or another court. For the purposes of this trial you will hold it to be necessary, to justify a verdict against the defendant, that when he applied for and took his patent, he knew that the things, or some of them, that he claimed as his inventions, had been used before, and were not his discoveries.

Knowledge, then, being necessary to bring the defendant under the penalty of this section of the act, we must inquire

what the knowledge is that will be sufficient for his condemnation. The complainant, in the first place, insists upon the legal or presumptive knowledge arising from the record of Delano's patent, long before that obtained by the defendant. The record of Delano's patent and its specification could be no notice of his discoveries to Scott, unless there is a substantial identity between the specifications of the two patents. This you will decide. You have them both, and have heard the elaborate arguments of the counsel of the respective parties, affirming and denying this identity. If you shall be satisfied that such identity does exist between the two specifications of Delano and Scott, the question then occurs, whether the record of Delano's patent in the office of the department of state, was such a notice to Scott of that patent and its specifications, as will bring him within the provisions of the tenth section of the patent law? Is it such a knowledge or notice as will render his suggestion or allegation that he was the inventor, surreptitious and false, according to the construction I have given to that section? Must actual knowledge be brought home to him of a previous use or patent of the same inventions; or will a legal construction or presumptive knowledge be sufficient?

With the interpretation I have adopted of this section of the act, a constructive notice of a preceding patent will not be sufficient for the condemnation of the defendant; to fix the charge of actual falsehood and fraud upon him, actual knowledge must be proved. It is not like the case of a disputed right to property between two purchasers, where, if the first buyer has put his deed on record, he has given all the notice of his title the law requires, and a subsequent purchaser who neglects to make the inquiry at the proper place, will buy at his peril. The case of Odiorne v. Winkley, (2 Gallison, 51) was a suit brought under the sixth section of the act for the invasion of a patent right.

It is probable, however, that you will make up your opinion respecting the knowledge that Scott had of Delano's inventions from the direct evidence in the cause. It is certain that Scott

knew Delano had a patent for improvements in making iron chests, and being about to get a patent himself for the same object, you will judge whether it is not to be presumed that he did inquire, at the patent office, what the improvements of Delano were. In addition to this reasonable presumption, much stronger than the ordinary constructive notice afforded by a recorded instrument, you have evidence that Scott came to Delano's shop as a common smith, having never before been engaged in making iron chests, nor, as far as we know, having ever seen one made; and that, if you are satisfied of the identity of the improvements claimed, the chests of Scott are the same with those he saw made, and assisted in making, in Delano's shop. If this evidence is relied upon, it brings home to Scott the full knowledge of Delano's improvements, and, of course, when he obtained a patent for them for himself, he did it surreptitiously and by false suggestion. (The Judge then recapitulated to the jury the prominent parts of the testimony, to show the actual knowledge of the defendant, that the improvements he has patented, were those previously patented by Delano, and that he obtained his knowledge of them in Delano's shop.)

The Jury found a verdict for the plaintiff.

## DISTRICT COURT OF THE UNITED STATES.

### Eastern District of Pennsylvania.

NOVEMBER SESSIONS, 1834.

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HENRY WILSON

*v.*

THE STEAMBOAT OHIO.

1. A contract for wages on board of a steamboat, plying between ports of adjoining states, on a navigable tide river, may be enforced by a suit in rem, in the admiralty.
2. The pilot, deck-hands, engineer, and firemen on board of a steamboat are entitled to sue in the admiralty for their wages.

ON the 24th November, 1834, Judge HOPKINSON delivered the following opinion:

The question in this case is, whether the hands of a steamboat, that is, the pilot, the firemen, and deck-hands, navigating the river Delaware, between the city of Philadelphia and the state of Delaware, carrying passengers and merchandise, are mariners entitled to attach the vessel and recover their wages in this court.

I have turned to my opinion in the case of Smith v. The Pekin, (ante, p. 203,) which was a libel for wages. The libellant had shipped at Smyrna, in the state of Delaware, as cook and steward, to ply between Smyrna, Brandywine, and Wilmington, in Delaware, and the port of Philadelphia. A plea was filed to the jurisdiction of the court, on the ground taken in this case. It was fully argued, and the authorities

carefully collected. After a deliberate examination of the law, I was well satisfied, that the service was a maritime service, and the court had jurisdiction of the case, and decreed accordingly. I adhere to that opinion.

As to the capacities, in which the libellants in this case were severally employed on board of the Ohio; the pilot, the deckhands, the engineer and the firemen; I think they are all entitled to sue in the admiralty for their wages. In the case of The Pekin, the libellant was the cook and steward of the sloop, and might, in strictness, be said to have nothing to do with navigating her. In the case of Ross v. Walker, (2 Wilson, 264,) it is said to be established, that any officer or common man who assists in navigating the ship, (except the master,) even the surgeon, is a mariner, and may sue in the admiralty for his wages. So of the carpenter; in short, any one, whose services are employed to preserve the ship, or those on board of her, is deemed, to this intent, to be a mariner.

Decree. That the libellant, Henry Wilson, recover and have paid to him the amount of wages claimed.

## The United States of America
*v.*
## Twelve Casks of Cudbear imported in the Brig Achilles.

1. Where goods, subject to ad valorem duty, are purchased in a foreign place and exported to the United States, a true valuation in the invoice is the actual cost at which they were purchased.
2. Where goods, subject to ad valorem duty, are manufactured in a foreign country, and exported to the United States by the manufacturer, a true valuation in the invoice is the market price or value at the place of exportation.

The information filed in this case by the District Attorney, charged that on the 18th July, 1831, certain goods, wares, and merchandise, to wit, twelve casks of cudbear, were imported into the port of Philadelphia, from a foreign place, to wit, Bristol, in England, on board of the brig Achilles, of which Thomas Cox was master, and were entered at the custom house on the 30th July; that these goods were then and there subject to ad valorem duty; and that the invoice thereof was made up with intent, by a false valuation, to evade and defraud the revenue. The law alleged to be violated was the fourth section of the act of 28th May, 1830, which provides, "that the collectors of the customs shall cause at least one package out of every invoice, and one package at least out of every twenty packages of each invoice, and a greater number, should they deem it necessary, of goods imported into the respective districts, which package or packages they shall have first designated on the invoice, to be opened and examined; and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order forthwith all the goods contained in the same entry to be inspected; and if such goods be subject to ad valorem duty, the same shall be appraised; and if any package shall be found to con-

tain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited."

On this information, the cudbear being seized and publication made, Philip Bennett, of Philadelphia, appeared and claimed the goods in question, as the sole owner and importer; and, at the same time, denied the allegation that the invoice was made up with intent, by a false valuation, to evade and defraud the revenue.

It did not appear, by the pleadings or otherwise, that the seizure was made on land, and the case was heard by the District Judge on the 8th December, 1834, when the following facts and circumstances were proved.

On the 18th July, 1831, the brig Achilles arrived at Philadelphia, with the twelve casks of cudbear on board. On the 30th of the same month, Philip Bennett went to the custom house and entered them as the owner and importer thereof; taking at the time the oath prescribed in the fourth section of the act of 1st March, 1823, to be taken by the owner, "in cases where goods, wares, or merchandise, have been actually purchased;" and declaring that the invoice produced, contained a just and faithful account of the actual cost of them, including all charges. The invoice was as follows:

"Bristol, May 7th, 1831.

Mr. Philip Bennett bought of Lediard Jones and Mortimer, twelve casks of cudbear, nett 42.0.24, or 4728lb, at 6*d.* £118.4.0.

Lediard Jones and Mortimer.

Per Achilles, T. Cox, for Philadelphia."

After an examination of one cask, it was deemed necessary, by the collector, that the whole should be examined, which was done on the 2d August, by the United States' appraisers. They carefully inspected the cudbear, and compared the price with that usually paid for what was of similar quality. The result was a report that there was an undervaluation in the in-

voice, and that the fair market value of the article imported was, at least, eight and a half pence per pound. Mr. Bennett considered this appraisement too high, and according to the provisions of the third section of the act of 28th May, 1830, two merchants, Messrs. Lowber and Davis, were, with his assent, appointed by the collector, to make a re-appraisement. The result was an increase in the valuation of the cudbear to ten pence per pound. No other evidence of the purchase was offered except the invoice above mentioned. On the 12th August, the cudbear was seized by the collector, on the ground stated in the information. In the month of October following, Mr. Bennett presented to the collector another invoice, being a copy of that exhibited at the time of entry, but now accompanied by a consular certificate, prepared according to the provisions of the eighth section of the act of 1st March, 1823, in cases where the goods are owned by a person not residing in the United States. In this certificate Philip Jones makes oath, before the American consul, at Bristol, that the cudbear in question was consigned by the house of Lediard Jones and Mortimer, of which he was a member, to Philip Bennett; that it was actually manufactured for their own account; and that the annexed invoice contained a true and faithful account of its actual value.

On the hearing, testimony, taken under a commission to England, was given on the part of the claimant, to show that he was the bonâ fide purchaser and actual owner of the cudbear at the time of importation, and not the mere consignee. Much evidence was also produced to prove that it was an article of inferior quality to that usually imported, and from which the appraisers formed their estimate of value.

The case was argued by Gilpin, District Attorney, for the United States, and Broom, for the claimant.

Judge Hopkinson delivered the following opinion:

The information claims a forfeiture of the goods described in it, on the ground that the invoice, by which they were entered

at the custom house, was made up, with intent, by a false valuation, to evade and defraud the revenue.

The material question, then, is, what is a false valuation, in the meaning of the revenue laws? We come at this by inquiring, what is a true valuation under those laws?

Two tests of true value are given by the law. 1. In the case of a purchase of goods in a foreign place, exported to the United States, the true value, at which they must be invoiced and entered, is the actual cost and price at which they were sold and purchased. 2. In case of goods sent to this country by the manufacturer on his own account, the true value, at which they must be invoiced and entered, is the market price or value at the place of exportation.

The claimant alleges that the goods were purchased by him, in England, of the manufacturers, Messrs. Lediard Jones and Mortimer, and that his invoice truly states the price at which they were purchased. If this be true, he fully answers the information and acquits himself of the forfeiture.

What is his proof to support this claim? - 1. The invoice produced at the custom house for the entry, and sworn to by him. This instrument or invoice is, in form, a bill of sale; a bill of parcels. It is headed, "Bristol, 7th May, 1831, Philip Bennett bought of Lediard Jones and Mortimer." The weights of the twelve casks are then particularly given. The whole is charged at six pence per pound, and carried out at one hundred and eighteen pounds four shillings; and, at that price, the entry is made. 2. The testimony taken under the commission to England, by which two witnesses were examined; one of them, Philip Jones, of the above firm; the other, James Parsons, an accountant in Bristol, and employed by the said firm, The former witness, Philip Jones, swears directly and distinctly to the sale of the cudbear in May, 1831, to the claimant, and that the price charged in the invoice "was the actual price and cost of said cudbear, paid or contracted to be paid by the said Bennett to our firm therefor." Parsons says that he believes the said firm did sell to Bennett the cudbear mentioned,

and ship it to him at Philadelphia. These depositions are accompanied and corroborated by an authenticated copy of the account current, between the said firm and the claimant, in which this cudbear is charged to him on the day of the invoice in the regular course of the account, preceded and followed by many articles or charges in due order and apparent fairness. The cudbear is charged in the account at the same price at which it was invoiced and entered at the custom house.

If these depositions and documents may be relied upon, the claimant has made out his two points of defence; that is, that these goods were purchased by him in England, and that he has invoiced and entered them at the actual price and cost he paid for them.

Let us suppose that this is not the truth of the case; but that the goods were actually the property of Lediard Jones and Mortimer, and exported by them to this country, consigned to the claimant, and to be disposed of here on their account. How will the forfeiture then stand? The question still is, were they entered by an invoice made up to defraud the revenue by a false valuation. We must, in this view of the case, put aside the testimony of Mr. Jones, he being one of the firm to whom the goods belong. There being no actual sale of the cudbear, we cannot have the price, at which it was sold, as our test of a true or false valuation. We must resort to the other test; to wit, the market price or value at the place of exportation. What case has the claimant on the evidence in this view?

1. The evidence of Mr. Parsons. He swears, that he believes the cudbear alluded to, was invoiced at sixpence a pound, "which was its fair value in the English market." That there are usually three qualities made, which differ from fourpence to three farthings a pound; that the cudbear shipped to the claimant to Philadelphia was of the worst quality; that in March, 1831, the claimant bought of Lediard Jones and Mortimer twenty-four casks of cudbear, which were shipped to New York by the Coriolanus in April, 1831, and six casks shipped by the Protector, of the same quality and price with

that shipped to Philadelphia. It appears, by a certificate from the deputy collector at New Nork, that the twenty-four casks mentioned by Parsons arrived there in the Coriolanus, and were then admitted to an entry at the price or value mentioned, that is, sixpence a pound; and in the account current alluded to they were so charged to the claimant.

How are these proofs of the market price or value of the cudbear affected by the testimony taken here? It seems to be an article little known here now, and which was still less so at the time of the arrival of this importation; at least, the great difference in the quality and price was not then well understood. The better qualities only seem then to have been brought here, and it was by the prices of those better qualities, and a comparison made between them and this, that the value was fixed upon this by the appraisements of the custom house officers, and the other appraisers subsequently appointed by the collector. The first appraisers put the cudbear at eight pence halfpenny per pound, making the whole invoice worth one hundred and sixty-seven pounds nine shillings. The second appraisers went still higher, valuing it at ten pence per pound, the whole at one hundred and ninety-seven pounds. We have had both sets of appraisers here under examination. They made their estimate, as Mr. Ross says, under information which they took pains to obtain, that the "article was of a fair quality."

Other evidence, we have had in this cause, affords good reason to believe that this information was not correct, and of course, that the estimate made upon it ought not to be our rule of value. Mr. Lowber, one of the appraisers appointed by the collector, testifies, that at the time he valued this cudbear at tenpence a pound he believed it to be its true value; he formed his judgment upon what he had paid for the article when imported by himself. His came from London, and he paid one shilling and threepence for some, and one shilling and sixpence for other parcels. His cudbear was made from moss of the Canary islands, which is considered the most valuable. It was by a comparison with such an article that he valued the importation

of the claimant. He adds, that he always imported the first quality, considering the inferior to be of little value. Since he made the appraisement he has ascertained from the manufacturers, who use it, that the inferior quality is not worth buying. With his present knowledge of the article, he would not buy that in question at any price, to sell out of his store. He does not think it has the value he appraised it at. We must remember that Mr. Parsons swears, expressly, that the cudbear shipped to the claimant was of the inferior quality.

The testimony of Mr. Bullock seems to be decisive of the value of this article, at least in the Philadelphia market. He is well acquainted with it; is in the habit of buying and selling it; has a great deal of business with the manufacturers who use it; and has examined this cudbear. It is of very inferior quality; the worst he has ever seen. He has a part of that imported by the claimant into New York now on hand. It was sold by auction in New York for eight cents; part of it was sold in the same way in this city, for the same price. He has frequently offered it for sale at that price, but the manufacturers will not touch it. He has seen an invoice from the same house at Bristol, to another person, in which cudbear was charged at the same price, six pence per pound.

Upon this evidence, it is impossible to say, that the invoice of the cudbear in question was made up, by a false valuation, to defraud the revenue, even if we shall consider it to be a consignment made by the manufacturers on their own account, and, of course, to have the truth of the invoice tested by the price or value of the goods at the place of exportation. If, on the other hand, we shall consider it as the property of the claimant, purchased by him of the manufacturers, the testimony is uncontradicted and satisfactory to prove that the price or value stated in the invoice, is precisely that which it cost him in England.

No wrong, however, is imputable to the officers of the customs. They obtained the best information on the subject within their reach, and acted on it in good faith.

DECREE. That the information be dismissed, and the goods restored to the claimant.

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WILLIAM TRAINER AND JAMES CRAWSHAW

*v.*

THE BOAT SUPERIOR, OF ALBANY.

1. To justify a person employed on board a vessel in suing in the admiralty for his wages, the services rendered must contribute to the preservation of the vessel, or of those employed in her navigation.
2. Musicians on board of a vessel, who are hired and employed as such, cannot enforce the payment of their wages by a suit in rem in the admiralty.

THIS was a claim by the libellants for wages, under circumstances somewhat peculiar. The vessel was originally built for a canal boat, but was now employed as a museum, for the exhibition of various articles for public amusement at the places to which she went, along the shores of the bays and rivers in the United States.

The libellants were shipped at Philadelphia, on the 15th December, 1833, at twenty-five dollars a month, as musicians to play for the attraction and amusement of the audience or spectators, who should attend the exhibition, which was made on board of the boat at the wharf or shore of the places where they stopped. The contract of the libellants was, that they were to receive their pay for their "performances as musicians on board the canal museum boat." This boat or floating museum left Philadelphia soon after the libellants were shipped, passed down the Delaware, went through the canal to the Chesapeake, to Chesapeake village, Elkton, Annapolis, thence to Norfolk, and thence to various places in North Carolina; making exhibitions, and remaining at each place as long as any advantage was found in doing so. The boat was navigated, sometimes by

the use of sails, sometimes by her oars, and through the canals she was drawn by horses. The libellants proved that they occasionally assisted in rowing the boat, with other services on board of her, in passing from place to place, and they claimed their wages generally as mariners. The question was, in order to give jurisdiction to the court, whether this was a maritime contract; whether the services rendered by the libellants were maritime.

For the libellants it was alleged that their labour was necessary for the navigation of the boat; that their services as musicians were required only at the stopping places; that, in the mean time, they rendered all the services of mariners; that there were not hands enough on board to carry the boat from place to place without their assistance; that the boat had sails and two masts; that they assisted in rowing and in attending the sails under and by the orders of the master of the boat; that there was but one man on board, and a boy except the musicians; and that a woman was there as cook.

On the other hand, proof was given that the libellants were hired as musicians; that their contract was for that service, and no other; that when the contract was made with one of them, it was mentioned that the musicians, generally, would sometimes assist in working on board, and he said he should have no objection. The master was to navigate the boat, and had one man to assist him, and afterwards added a man for that service. On former voyages, the boat had been managed with this force, on the Chesapeake bay, when blowing hard. It was admitted that the musicians worked sometimes, but it was as they pleased, and no right was claimed of them for such services. When tired they stopped at their own pleasure, and went below to read. They frequently refused to work when requested. They always denied any right to call upon them to work, and appealed to their written contract, which was "for their performances as musicians on board the canal museum boat." Once, when it was blowing hard in the bay, they were asked to come up and assist, but refused, saying that they were sea sick.

The case was argued by GRINNELL for the libellants, but the court stopped the counsel for the respondent.

Judge HOPKINSON delivered the following opinion:

It is incumbent on the libellants to show that this was a maritime contract, or that the services performed by them were maritime. The courts, from the convenience of the jurisdiction in such cases, have gone a great way in considering services on board of a vessel to be maritime, although, strictly speaking, the persons were not mariners, nor employed in the navigation of the vessel. Their cooks, carpenters, stewards, and even surgeons have been allowed to sue in the admiralty as mariners, or as persons rendering maritime services under a maritime contract. The broadest principle, however, that has yet been recognised is, that the services rendered must be necessary, or, at least, contribute to the preservation of the vessel, or of those whose labour and skill are employed to navigate her. Thus a carpenter is required for the preservation and repair of the ship, in case of accident; the cook and steward to feed the crew; the surgeon to attend to their health and minister to the sick. This, certainly, is opening a ground sufficiently extensive for every case that, with any reason or under any pretence, can be considered as a case of maritime service. But to obtain a jurisdiction over the claim of these libellants, we must go much beyond that limit. The contract was expressly for services having nothing to do with the navigation or preservation of the boat or her crew, and, in truth, were required only at times when the boat was at rest, and employed as a place for the exhibition of curiosities. They did sometimes work, but at their own will and pleasure. They took up an oar when tired of the fiddle bow, and handled a sail as a change from their music books.

The libel must be dismissed, and, if wages are due to the libellants, they may be recovered in another place.

DECREE. That the libel be dismissed with costs.

## Benjamin Wood
## v.
## William Williams.

1. A controversy, respecting the validity of a patent right, is one strictly between the parties immediately concerned, although the public may have an eventual interest in it.
2. Under the patent laws, the United States are not a party in a litigation respecting the validity of any rights claimed or denied by virtue of those laws.
3. Where the district court, under the provisions of the act of 21st February, 1793, orders a scire facias to be issued against a patentee, on the prayer of a petitioner, they will not permit the United States to be substituted as plaintiffs in the place of the petitioner.

On the 23d May, 1834, a rule was granted on the defendant, to show cause why process should not be issued to repeal his patent, for a certain machine for hulling and clearing clover seed; under the provisions of the tenth section of the act of congress of 21st February, 1793, (1 Story's Laws, 303.)

On the 9th December, 1834, the case was argued by Meredith, for the plaintiff, and Kittera, for the defendant.

Meredith, for the plaintiff.

The affidavit of the plaintiff, on which the rule was granted, was read. This affidavit was not received as evidence, but read, de bene esse, by consent. The depositions of several witnesses, taken under a rule of court, were also read to support the motion.

Kittera, for the defendant.

It is denied that either the deposition of the plaintiff, on which the rule was granted, or a subsequent deposition made by him, is any evidence on this hearing. If the other testimony of the plaintiff furnishes a probable case against the defendant, then the scire facias will be issued; otherwise the process will be refused. The facts of the case do not furnish such a one as will warrant the process prayed for.

MEREDITH, for the plaintiff, in reply.

The deposition of the plaintiff is evidence on this hearing. This is a prosecution, by the government of the United States, to repeal a patent improvidently issued by them; and the complainant is but the mover of the proceeding. The opinion of this court, in the case of Delano v. Scott, (ante p. 492,) shows that the original affidavit, on which the rule was granted, is good evidence at this hearing.

Judge HOPKINSON delivered the following opinion:

No such thing was decided, or intended to be so, in that case. No such question was raised. In my opinion, I referred to the affidavit of the complainant, as exhibiting the ground of the application, and showing the allegations of the complainant against the defendant. I then proceeded to state the evidence by which the complainant had maintained his allegations; to wit, 1 A certain patent; 2. Depositions of witnesses. The affidavit of the complainant is not mentioned as any part of the testimony. The paragraph quoted, towards the conclusion of the opinion, is a simple declaration, that the defendant had given no evidence to contradict the allegations of the complainant in his affidavit. From this it cannot be inferred that the affidavit was a part of the evidence on which the court acted. Whether, under the act of congress, this affidavit would be sufficient primâ facie evidence, to call for some proof on the part of the defendant, and would be enough to grant the process upon, if not impeached or contradicted, is a question that remains open.

MEREDITH, in continuation.

It is contended that, on a full examination of the depositions produced, they are sufficient to sustain this application without the complainant's affidavit.

Judge HOPKINSON observed that there was sufficient cause on the other depositions, exclusive of that of the complainant, which he put out of the case, without giving any opinion on

its competency. It was unnecessary. A probable case had been made out against the defendant.

RULE made absolute, and process in the nature of a scire facias ordered to issue.

Afterwards, the counsel for the complainant, previous to taking out the scire facias as above ordered, moved the court for an order, that the cause be recorded and docketed, as an action wherein the United States are plaintiffs and William Williams is the defendant, and that the process of scire facias be issued as between those parties.

After hearing the argument, on the 9th December, 1834, for this motion, Judge HOPKINSON delivered the following opinion:

The petitioner, in this case, has so far sustained his complaint, in the manner prescribed by the act of congress, that process has been ordered to issue against the said William Williams to repeal his patent. This process is a scire facias, and, previous to taking it out, the complainant has moved for an order, that the cause be now recorded or docketed, as an action wherein the United States are plaintiffs, and the said William Williams is the defendant; and that the process of scire facias be issued as between these parties.

No decision or practice, under the patent laws of the United States, has been adduced to support this motion; but a reliance is had upon the practice in the courts of England, in cases for the repeal of patents. The whole proceeding, both for obtaining a patent, and for revoking it, is so different in England from that prescribed by our law; the character and foundation of the right, are so dissimilar in the two countries, that we cannot look, for a rule on this question, to the courts of England; especially if, upon an examination of our act, we shall there find such an indication of the course of proceeding intended to be given, as will guide us through the present difficulty. In the case of Stearns v. Barrett, (1 Mason, 153,) Judge Story adverts to the difference between our patent laws and those of England. He says; "A scire facias is a process altogether confined to the crown, with the exception of the single case, where two patents

have issued for the same thing, in which case the prior patentee may maintain a scire facias to repeal the second patent. But under our patent act, any person, whether a patentee or not, may apply for the repeal. There are other differences which it is not now necessary to enumerate."

I shall not find it necessary to go further than the act of congress, and the practice that has been adopted under it, so far as I have been able to obtain a knowledge of it, for the decision of the question now under consideration. This simply is, when process has been ordered and issued, by this court, for the repeal of a patent, and the allegations, upon which the process was ordered, are to be put in a shape for trial, who are the parties to the suit? By and between whom is the issue to be made? Are the United States to be introduced as the plaintiffs to maintain the issue, to prove the truth of these allegations against the patentee, who is, of course, the defendant? Is the petitioner or complainant, at whose instance and on whose affidavit of the truth of the cause of complaint, the proceeding was commenced, who called upon the patentee to answer the complaint, at whose prayer the process was granted, who, up to this point, has appeared alone as the adversary of the patentee, now to withdraw himself from the record and the case, and, at his pleasure, without the co-operation or assent of any officer or authority of the United States, to put them in his place to carry on the war which he has provoked; which he only has the means of sustaining, or ought to have had when he commenced it?

On a careful review of the patent laws of the United States, I have found no indication of an intention, that the United States are to be brought in as a party to a litigation, respecting the validity of any rights claimed or denied under those laws. On the contrary, these rights are considered as the private rights of the party who has duly obtained them, and are afterwards to be impeached and defended as such. The parties to every suit for the trial of the right are the petitioner, on whose complaint the inquiry was instituted, and the patentee who asserts the

right. The first is bound to make good his allegations that the patent was obtained surreptitiously, or upon false suggestions, and the other to defend himself against them. It is a controversy strictly between these parties, although the public may have an eventual interest in it. They have the same interest in every suit, in which the validity of a patent is contested; for if it be defeated, the pretended invention becomes a common property, as fully as if the letters patent had been repealed by the proceeding here adopted.

The proceeding, now in progress before the court, was instituted under the authority and directions of the tenth section of the act of 21st February, 1793. Do any of the provisions of this section give any countenance to the motion of the complainant? The first step in the proceeding to obtain the repeal of a patent, is an oath or affirmation, made before the District Judge by the petitioner for the repeal, that the patent was obtained surreptitiously, or upon false suggestions. Upon this the judge, if the matter alleged appear to him to be sufficient, shall grant a rule, that the patentee show cause why process should not issue against him to repeal such patent. If, on the return and hearing of this rule, the cause shown to the contrary shall not be sufficient, the judge shall order process to be issued against the patentee. This process is a scire facias, upon which an issue is made, of fact or law as the case may be, and, on the the trial, the petitioner or complainant is bound to make good the allegations contained in his petition and verified by his affidavit. He must prove affirmatively that the patent was obtained surreptitiously or upon false suggestions. The issue being thus tried, what is the judgment which, by the directions of the act, the court must render, as it is determined, for the one party or the other? If it shall be against the patentee, the judgment is, that his patent be repealed; " and if the party, (so he is denominated,) at whose complaint the process issued, shall have judgment against him, he shall pay all such costs as the defendant shall be put to, in defending the suit, to be taxed by the court."

Is it not clear that the makers of this law considered the parties before the court, the parties to the suit commenced by the process of scire facias, to be the petitioner or complainant, now the plaintiff, on the one side, and the patentee, now the defendant, on the other? There is no meaning in the language of the act, on any other construction. The complainant is expressly called the party, against whom, if the complaint is not sustained, the judgment of the court is to be rendered; and who, by that judgment, is to be compelled to pay the costs of the patentee or defendant, as in other cases. Can the judgment in any suit be rendered against a person not a party to it? Is any one of these provisions consistent with the idea, that the United States are, at any stage of the proceeding, to be brought in by the motion of the complainant, and put upon the record as the plaintiffs in the suit, to have a judgment for costs rendered against them as "the party at whose complaint the process issued." The person or party, at whose complaint the process did issue, and who was bound to sustain the allegations upon which it was issued, withdraws himself, on his own motion, from the controversy, and puts the United States there in his place, to suffer the penalty of his failure to support his own cause of action or complaint. The judgment is to be rendered against the party at whose complaint the process issued, and this cannot be done, unless the same party is also the party to the suit when the issue is tried and the judgment upon it rendered.

The act of the 7th June, 1794, was passed to restore suits which had been commenced under the act of 10th April, 1790, and had been suspended or abated by the repeal of that law. The enactment is, that such suits and process may be restored at the instance of the plaintiff or defendant, and "the parties to the said suits, actions, process or proceedings are entitled to proceed, provided that, before any order or proceeding, other than for continuing said suits, after the reinstating thereof, shall be entered or had, the defendant or plaintiff, as the case may be, against whom the same may have been reinstated, shall be brought into court by summons, attachment or such other pro-

ceeding, as is used in other cases, for compelling the appearance of a party." Assuredly this provision was never intended for a suit to which the United States are a party: nor could the court compel their appearance by summons, attachment or any other proceeding. The complainant and the patentee, are clearly considered by this act, to be the parties, plaintiff and defendant in the suit.

The practice of the courts, so far as I have obtained a knowledge of it, is in conformity with this view of the law. The case of Stearns v. Barrett, (1 Mason, 153,) stands on the docket, as reported, as a suit between the complainant and the patentee. Upon the return of the scire freias, the patentee, (that is, Barrett) as defendant, pleaded, "that his letters patent were not upon false suggestion or surreptitiously obtained, as set forth in the said writ, and thereof he puts himself upon the country; and the plaintiff (that is, Stearns) puts himself, as to this issue upon the country likewise." Upon the issue thus formed, the parties, that is, Barrett and Stearns, went to trial before a jury. A special verdict was returned, in which the complainant and patentee, and nobody else, are treated and spoken of as the parties, plaintiff and defendant. The jury find that the plaintiff has not supported his allegations, and therefore they find for the defendant: and, accordingly, the judgment of the court was rendered for the defendant. The learned judge, throughout a long examination of the case, on several controverted points, uniformly, as the jury in their verdict had done, speaks of the complainant and the patentee, as the plaintiff and defendant in the suit, and no other party is alluded to.

The clerk of this court has examined its records, and produced several actions for the repeal of patents. Some of them are upon motions for process, and some after the scire facias has issued. In all, the parties are stated on the record to be the complainant, as the plaintiff; and the patentee, as the defendant. Not an instance, in which the United States were introduced as the plaintiffs, or, in any other way, as a party to the pro-

ceeding or suit, has been shown by the counsel for this motion, or come to the knowledge of the court.

The MOTION was overruled.

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MARMADUKE THACKAREY AND JACOB CRILLEY

*v.*

THE AMERICAN BOAT, FARMER OF SALEM.

1. Waters within the ebb and flow of the tide, are to be considered as the sea.
2. In cases of torts, injuries and offences, locality brings them within the admiraly jurisdiction; but in cases of contract, it is also necessary that the subject matter be of a maritime nature.
3. A contract relative to service on board of a vessel, and on the sea or waters within the ebb and flow of the tide, cannot be enforced in the admiralty, unless the service is essentially a maritime service.
4. Steamboats and lighters engaged in trade or commerce on tide water, and the seamen employed on board, are within the admiralty jurisdiction; but not ferry boats or those engaged in ordinary traffic along the shores.
5. A contract for the payment of labour, on board of a vessel employed in carrying fuel to the city of Philadelphia, from the opposite shore of the Delaware river, cannot be enforced by a suit in rem in the admiralty.

THIS was a libel, for wages alleged to be due for services performed by the libellants, as mariners, on the high seas. The libel concluded with a prayer for process of attachment. The boat, which was of forty-two tons burthen and upwards, plied between the port of Philadelphia, and Cooper's Creek, a small stream which is nearly opposite thereto, and enters the Delaware from the Jersey side of the river. The vessel was employed in bringing wood for fuel, from the creek to the city, and in no other service. On application to the judge, at his chambers, the process prayed for in the libel was refused.

On the 23d January, 1835, Judge HOPKINSON delivered the following opinion:

The libel in this case was presented to me, at my chambers, on the 16th December last, concluding with a prayer for process of attachment against the vessel, and that she should be condemned and sold, for the payment of the wages claimed by the libellants. The libel contained the usual allegation, supported by the affidavit of one of the libellants, "that the said boat or vessel is about to proceed to sea, before the expiration of ten days next after the delivery of her cargo." I declined to order the process asked for, and think it is incumbent upon me to give my reasons for so doing; and the more so, as the occasion is a fit one for an endeavour to bring, within some rule or principle, a class of cases, which is now growing upon the admiralty jurisdiction of this court.

The libel states that the libellant, Marmaduke Thackarey, on the 13th October, 1834, at the port of Philadelphia, in the said district, at the request of Jacob Crawford, master of the American boat Farmer of Salem, of forty two tons and upwards, shipped as a mariner on board the said boat to perform voyages on the high seas, and within the jurisdiction of this court, to wit, from the said port of Philadelphia, to Cooper's Creek, in the state of New Jersey, and thus alternately between the said port of Philadelphia and Cooper's Creek, at the following rate of wages, to wit, two voyages at two dollars and fifty cents each; one voyage at three dollars; two voyages at one dollar and fifty cents each; and seven trips at two dollars each. The claim of the other libellant is set out, substantially, in the same manner.

There is certainly no want of formality in this libel, and if we were not permitted to look out of it, there would be no want of jurisdiction in this court, over the subject matter of it. The known truth of the case is this. Cooper's Creek is a small stream issuing into the Delaware, from the Jersey side of the river, about two miles above the city or port of Philadelphia. The boat in question was employed in bringing wood for fuel

from this creek to the city, and in no other service; making her voyages, as they are called in the libel, at the rate of about two in every week. It appears that she performed about twelve of these voyages in about six weeks. The libellants were hired and paid by the trip, by a verbal agreement, in the manner of hiring common labourers. Their duty was to take this boat to and fro, between the city and the creek, and to load and unload the wood brought by her to market. The time of the passage could seldom exceed an hour, and must have been frequently a shorter period. Such were the services and the voyages on the high seas, which are made the foundation for the jurisdiction of a court of admiralty, for the recovery of the wages of the libellants, as mariners.

Applications have so multiplied for admiralty process, to recover wages for services performed, on board of our river craft, that I have found it necessary to make a pause in granting it, until I could carefully examine the subject, and, if possible, ascertain the limit to which the jurisdiction of this court may rightfully be extended, in such cases. Little regard has been had, in these applications, to the character of the use or employment of the vessel; the manner in which she was navigated; or the nature of the contract and services to be performed. The common river boats, of every size, have become ships or vessels, navigating the high seas; their daily trips, from shore to shore of adjoining states, are voyages on the high seas; and the loading and unloading of wood and similar articles for the market, brought from places within a few miles of the city, for daily wages, are denominated marine services and and maritime contracts. No more has been thought necessary to be shown, than that the thing floated on the water, and that the water was within the ebb and flow of the tide. I have, in several of such instances, refused the process demanded; but it has become necessary to do it in a more formal way, and to attempt to fix some rule for the government of similar cases. I confess that I do not expect to be able to draw a clear line, which will decide the place of every case that can occur, to be

within or without the admiralty jurisdiction; but I hope to fix some principle, as a guide for future proceedings in this court, unless they shall be rejected by a higher authority.

In pursuing the inquiry, into which I am entering, I am saved from the immense labour, so ably performed by a learned judge in the case of De Lovio v. Boit, (2 Gallison, 398,) of tracing the history of the jurisdiction of the admiralty, through its struggles with the common law courts, and of noticing the faint, equivocal, and changing lines, that have been drawn, from time to time, between the powers of these courts. I shall not find it necessary to go beyond the constitution, legislative acts, and judicial decisions of our own country. These are imperative upon this court, and supersede every other opinion or authority. My examination of this interesting question will, consequently, be brought within, comparatively, a narrow space, and may be made with reasonable brevity.

By the constitution, the judicial power of the United States, is extended to "all cases of admiralty and maritime jurisdiction;" and the judicial act, establishing the courts of the United States, carrying into effect the jurisdiction granted by the constitution, has awarded to the District Court, "cognisance of all civil cases of admiralty and maritime jurisdiction." The inquiry then, in every question of the power of the court, arising under this branch of its jurisdiction, is whether the cause is of admiralty and maritime jurisdiction. This inquiry also might lead us over a vast space; but, for our present purpose, that is, of determining whether the case now before the court is one of the description mentioned, it is unnecessary to go much further than to a judgment of the supreme court of the United States, rendered with great deliberation and care.

The contract I am required to enforce must be maritime, or I have no right to touch it. In order to bring it within this description, the libel alleges that it was for the performance of services on certain voyages on the high sea. Were the services of the libellants rendered on the high sea, in the legal signification of the terms? In the case of the steamboat Thomas

Jefferson, (10 Wheaton, 428,) this question seems to have been put to rest, on principles long and well established. The opinion of the court was delivered by Judge Story. It was a suit, brought in the district court of Kentucky, for subtraction of wages. The libel claimed them on a voyage from Shippingport in that state, up the river Missouri, and back again to the port of departure: and the question was, whether this case was of admiralty and maritime jurisdiction, or otherwise within the jurisdiction of the district court. I will here remark, this was the case of a steamboat, navigated, as they usually are, on a river far from the sea; but that neither the distance, nor the manner of navigating the boat, was made an objection to the jurisdiction. We may add, as a matter of notoriety, that she was employed in transporting passengers and merchandise between the places of her departure and destination. The judge, learned upon all subjects, and peculiarly so on this, states that, "in respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise, any jurisdiction, except in cases where the service was substantially performed upon the sea, or upon waters within the ebb and flow of the tide." Thus, as to the purposes of jurisdiction, in such a case, the court decides, in full conformity with acknowledged principles of law, that waters, which are within the ebb and flow of the tide, are to be considered as the sea; that a contract for wages, to be earned on waters so situated, is a maritime contract; that the service is a maritime service; and that the cause arising from it is of admiralty and maritime jurisdiction, as fully as if it related to a voyage to Europe. The judge presses the principle still further, and says, "there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide." In that case, the libel was dismissed, for want of jurisdiction, because "the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of the tide."

If, then, the locality of the service were sufficient to give jurisdiction to the admiralty over a contract, it is clear that I should sustain the present claim. The whole service was performed on the waters of the Delaware, within the ebb and flow of the tide. In conformity with the doctrine of the supreme court, I have repeatedly taken cognisance of claims for wages, earned in vessels plying as traders, carrying passengers and goods on freight, between this port and places on the river, in the states of Delaware and New Jersey. In the case of Smith v. The Pekin, (ante, p. 203,) the question was elaborately argued in this court, and decided as I have mentioned.

But locality is not, of itself, enough to give jurisdiction to the admiralty in cases of contract. We must also look to the subject matter of the contract; to the nature of the service and employment. We shall then discover that, in some instances, the service may be done strictly and truly on the sea, and yet the cause will not be "of admiralty and maritime jurisdiction." It is true, that in cases of torts, injuries and offences, the jurisdiction is settled by the place where they are committed; but not so as to contracts. The difficulty we have to struggle with is, to establish a satisfactory rule or line by which the subject matter of the contract and service may be clearly defined. I have acknowledged my inability to give such a rule, which will be universal in its application. Each case, as it occurs, must be decided by its circumstances, under the control of some principle as nearly general as can be obtained, on a subject so uncertain in its nature. It will be easier to say that a particular service is not marine, than to give a rule which will embrace or exclude each that may occur.

By referring again to the case of The Thomas Jefferson, we shall find a principle, which will serve us for a general guide to our inquiries. It is stated that, "the material consideration is, whether the service is essentially a maritime service." It is true, that the question still remains, what is a maritime service? In that case, the only test alluded to, was the locality of the service, whether performed on tide water or not, because,

in that case, no other question than that of locality arose, or was necessary to be examined or decided. The libel was dismissed, because the service was not done within the ebb and flow of the tide, and, therefore, clearly not maritime, however it might have been in other respects. But the court did not say or intimate, that every service performed on tide water is, therefore and necessarily, a maritime service. That it was done on tide water is an essential circumstance; but, non constat, that other circumstances may not also be essential to bring it under the admiralty jurisdiction. Can we say, did that opinion mean to say, that every thing done upon the sea, or upon tide water, is a maritime service? I think not.

In the case of De Lovio v. Boit, above quoted, Judge Story assists us on this point. He says, "The true interpretation of the words, things done on the sea, in this connection, would seem to be all things done touching the sea, that is, maritime affairs in general; and this is the approved interpretation asserted by the admiralty." He afterwards says, the *jurisdiction* extends to "all cases of maritime service and labour." In both instances, he shows that something besides locality enters into the question of jurisdiction; that we must attend to the nature of the transaction, the kind of service or labour, and inquire whether they relate to maritime affairs or not, and not merely to the place where they are done. If a thing done, or a contract made, in fact, upon the land, is considered to have been done on the sea, provided it relates to maritime affairs, we but follow out the same reason, or turn it back on the subject, in saying, that if the contract or thing does not relate to maritime affairs, if the service or labour are not in themselves maritime, they will not be taken, on the question of jurisdiction, to have been done on sea, although, in fact, they were so. The circumstance of the place, where the thing is done, follows the nature of the thing, and, as that is maritime or otherwise, the jurisdiction prevails or is denied.

In the case of The Jerusalem, (2 Gallison, 348) the same judge gave the law as he did in the case of The Thomas Jef-

ferson. "The true doctrine was always asserted by the learned judges of the admiralty, and has been recently recognised by Justice Buller, that the jurisdiction as to contracts, depends not upon the locality, but upon the subject matter of the contract;" and he adds, that the admiralty has "perfect jurisdiction over all maritime contracts." To be a maritime contract, as I have before said, it is not enough that the subject matter of it, the consideration, the service, is to be done on the sea, it must be in its nature maritime; it must relate to maritime affairs; it must have a connection with the navigation of the ship, with her equipment or preservation, or with the maintenance and preservation of the crew, who are necessary to the navigation and safety of the ship. Thus a carpenter, a surgeon, a steward, though not strictly mariners or seamen, may all sue for their wages in the admiralty, because they contribute, in their several ways, to the preservation and support of the vessel and her crew.

With all this aid, we meet with embarrassing difficulties in every attempt to designate a clear line, which will separate, with satisfaction and consistency in all its parts, cases of contract and service arising on rivers, into which the tide flows, proper for the admiralty jurisdiction, from those which are not so. On the sea, extra fauces terræ, the difficulty is hardly, at this time, felt, having been removed or cut down by judicial decisions, as in the case of the carpenter, surgeon, and others. But we have no such description of the vessel or her employment, or the services of those on board of her, navigating our rivers, as will at once decide the question of jurisdiction. The circumstances of any given case, the kind of vessel, the business she is engaged in, the places between which she is navigated, may make it apparent that it cannot be one for the cognisance of the admiralty, without furnishing a general rule of exclusion.

Cases will readily occur to the legal mind, in which, although the service is performed on the sea, or within the ebb and flow of the tide, no doubt can be entertained that it is, in no sense, a maritime service, and cannot be cognisable in the admiralty.

Nor does it depend on the manner, in which the vessel is equipped, with or without masts and sails; nor upon the power, by which she may be propelled, by sails, by oars or by steam. Steamboats, engaged in the business of trade or commerce, are clearly subject to this jurisdiction; and a learned judge, in another district, has considered lighters employed on tide waters, in the carriage of goods to and from shipping, to be under this jurisdiction. On the other hand, boats having masts and sails may, nevertheless, be clearly without it; such as ferry-boats used on the tide waters of our rivers, and plying from shore to shore, between two states. Also numerous boats of various sizes, which are employed daily in bringing fruit and vegetables to the market. I think no one would hesitate to say, that such vessels can, with no legal propriety, be said to perform voyages on the high seas; nor that the persons employed on board of them, hired by the trip or otherwise, are mariners engaged in marine services. Indeed they are, generally, loaded and unloaded, and navigated by men, who come from the fields and orchards, which they have cultivated, and bring the produce of their labour to market. They are farmers and gardeners, either for themselves or hired by others, and not sailors. If we should take the language of the supreme court, in the case quoted, in its broadest signification, such boats so employed, and those, who navigate them, would be subject to the admiralty jurisdiction. The service is performed "upon waters within the ebb and flow of the tide." But, as I have before said, the court had in their view only the case before them, which turned entirely on the locality of the service, and, as to that, they decided that the jurisdiction depended on the fact whether it was done upon tide water or not. We have seen that they thought, as a general proposition, that "the material consideration was, whether the service was essentially a maritime service;" and they applied the principle only to the case before them, deciding that it was not then a maritime service, because it was not performed on the sea, or on tide waters,

but not intimating that this circumstance alone would make a service maritime.

The character of the service, whether maritime or not, will depend, not only upon the particular business or employment of the individual on board of the vessel, but also upon the business or employment of the vessel. Thus a vessel may be navigated for foreign commerce, on the broad ocean, but persons may be hired on board of her, for services, which could not be called marine, and of which the admiralty would take no cognisance. On the other hand, the individual may be engaged in the actual navigation of the vessel, but she may be so employed that no service on board of her can be considered to be maritime. In regard to the character of the vessel or the business in which she is engaged, which is the object of our present inquiry, it is not questioned that those employed in foreign commerce are within the jurisdiction of the admiralty. As to those, which are employed on our tide waters, in going from place to place, in the United States, I hold them also to be under the same jurisdiction, provided they are occupied in the business of trade and commerce, in a liberal and fair meaning of the terms, in which I do not include the petty traffic of market or ferry boats, nor the carriage of fuel to a city, from its neighbourhood, and other services of the same description. I am aware that there is a want of precision in this rule, and it is intended only as a general guide. In every particular case, the judge must decide, from its circumstances, whether the employment of the vessel is in the business of trade or not; for so far I think the rule may be relied upon. The uncertainty is as to what should be considered to be trade and commerce. This criterion is not without support by good authority. Judge Winchester, whose learning in the admiralty law is highly and justly extolled, adverts to it. He says, in the case of Stevens v. The Sandwich, (1 Peters Ad. Dec. 235,) "within the cognisance of this jurisdiction, are all affairs relating to vessels of trade, and the owners thereof, as such; and all matters which concern owners, proprietors of ships, as such;" again "whatever is of a maritime

nature, either by way of navigation upon the seas, or negotiation at or beyond the sea, in the way of marine trade or commerce." In conformity with this rational and intelligible doctrine, Judge Story, in the case of De Lovio v. Boit, (2 Gallison, 468,) says, that the words "admiralty" and "maritime jurisdiction," include "all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea."

If we turn our attention to the act of congress for "the government of seamen in the merchant service," under the provisions and authority of which this libel is filed, and the process of the court demanded, many very direct arguments and inferences present themselves, to induce us to believe that a case like this never could have been in the contemplation of congress, in making the regulations, particularly as to the hiring of seamen and the recovery of their wages, found in that law. But I content myself with this general reference to it, as a particular analysis would require a longer examination and discussion than the occasion calls for or would warrant.

The general result to which my inquiry into this subject has brought me is, that as to torts, injuries and offences, locality gives jurisdiction; but as to contracts, there must be something more. It is not enough that the service performed, or to be performed, is on the high sea, or on tide water, it must in its subject matter be maritime; it must have some relation to trade and commerce; some connection with a vessel employed in trade; with her equipment, her preservation, or the preservation of her crew. Thus a carpenter, a surgeon, a steward, all contribute, in their several ways, to the preservation of the ship or her crew. But if the master should take with him a servant, whose sole business should be to shave him or comb his hair; or another to amuse him with a violin, the service would be performed on the high sea, but would it be a maritime contract or service, for which the ship could be libelled and attached in the admiralty; or her owners be personally responsible by any process?

In a late case, in this court, (ante, p. 514,) a libel was filed for wages earned on board of a boat, employed in going from place to place, in bays and rivers, on tide water, in Pennsylvania, Delaware, Maryland, Virginia and North Carolina, carrying a museum of curiosities, which were exhibited, in the boat, at the various places at which she stopped. She had no other object. The libellants were employed as musicians for the exhibition, but occasionally assisted, at their pleasure, in rowing the boat, when the sails could not be used. She was a large canal boat. I dismissed the libel, on the ground that the contract and services of the libellants could in no sense be considered maritime, although performed on tide water. On the other hand, (ante, p. 505,) I sustained the libel of the crew of the steamboat Ohio, plying between this port and Delaware city, in the state of Delaware, for she was employed not only in taking passengers, but in the transportation of merchandise between her port of departure and places in the southern and western states, which is strictly a trading service or employment. I do not mean to say whether a boat carrying only passengers, would or would not be within the same rule.

I have thus given, not perhaps as concisely as it might have been done, a view of the reasons which determined me to refuse the process prayed for by the libellants in this case. If they are not altogether precise and satisfactory, it may be because the subject is not susceptible of a rule which will be certain and universal in its application, or because I have not the ability to define it with accuracy and clearness. Having taken upon myself to refuse, at my chambers, to attach and detain the vessel, I was obliged to do so without argument, as that would have produced a delay injurious and expensive to a party whom I thought not amenable to this court. Occasions may occur hereafter when this subject may be more fully considered, and more satisfactorily decided.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

FEBRUARY SESSIONS, 1835.

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CHARLES A. HARPER AND WILLIAM C. BRIDGES

*v.*

THE NEW BRIG.

1. A lien of workmen and materialmen on a vessel, in a port to which she belongs, depends entirely on the provisions of the state law by which it is given.
2. The debts for which a lien on a vessel is given, are those contracted by the master and owner for work and materials used in building, repairing or furnishing her: the persons to whom such a lien is given, are the workmen and materialmen, who furnish the work and materials so used.
3. Where work or materials, necessary for building, repairing or supplying a vessel, are furnished on a contract with an intermediate agent or person who is not the owner or master, neither the workmen and materialmen, nor such intermediate person or agent, have a lien on the vessel.
4. Where money, subject to distribution, is in court after the report of an auditor, the decree does not follow the report of the auditor as a matter of course, because no exception has been taken to it.
5. Where a surplus remains in court, after the sale of a vessel by a proceeding in rem in the admiralty, a party, having a lien or appropriation of the vessel precedently legally fixed, may claim a distribution of such surplus, although his original demand was not such as could be proceeded for in the admiralty.
6. Where a vessel, bonâ fide assigned by the owner, is subsequently sold under a lien of workmen and materialmen, the assignee is entitled to a distribution of the surplus, in preference to a creditor having no such appropriation.

THE new brig having been condemned and sold by the decree of the court, made at August Sessions, 1834, (ante, p. 489,) the money arising from the sale was brought into court for distri-

bution. A great number of claims were filed, and among them one on the part of Charles A. Harper and William C. Bridges. All of them were referred to an auditor for liquidation. On his report being made to the court, Messrs. Harper and Bridges filed exceptions thereto.

On the 10th March, 1835, Judge HOPKINSON delivered the following opinion:

In August last a libel was filed in this court, by William S. Davis and George W. Lehman, against a certain vessel called the New Brig, praying for process of attachment against her, and that she might be condemned and sold for the payment of certain debts due to the libellants, and contracted with them by the owner of the brig, for materials furnished by them, and used by them, in building her. The process was accordingly ordered, the vessel was attached, and a final decree of condemnation made, after which the vessel was in due course sold, and the proceeds of the sale brought into court, where they now remain, subject to the order of the court for their distribution. A great number of persons who furnished work or materials for the brig, have presented their claims to the court, and prayed for payment out of the moneys which proceeded from her sale. Among them is the libel and claim of Charles A. Harper and William C. Bridges, who, with their petition, filed their account, consisting of several items, and amounting in the whole to the sum of six thousand and eighty-five dollars and seventy-eight cents. This claim, with all the others, was referred to an auditor to audit and examine all the accounts, and distribute the funds in court amongst the claimants.

The auditor has performed this duty, and made a report of his proceedings to the court. No exception was taken to his report, but one on the part of Messrs. Davis and Lehman, which was dismissed; and another on the part of Messrs. Harper and Bridges, which is now to be decided. These libellants take exception to the report, 1. Because the auditor has reported, that as part of their account, or claim, was a lien on the vessel

by virtue of the acts of assembly of this commonwealth of the 27th March, 1784; of the 5th March, 1819; and of the 11th April, 1825. 2. Because he has reported, that in the distribution of the funds arising from the sale of the brig, the claim of Messrs. Harper and Bridges should be postponed to the claims of the other claimants enumerated.

Some other exceptions are set out, but they depend upon the decision of the question mainly argued at the bar, that is, whether the account of Messrs. Harper and Bridges, or any part of it, gave them a lien on the brig, or a preference of payment out of the funds now in court, on the true construction of the acts of assembly above referred to. Some of the items of this account have not been insisted upon as liens, or debts, entitled to a preference; such as the account of J. Thomas for salt, twenty-three dollars and seventy-five cents; of G. Good for scraping, twenty dollars; and of advances made by Messrs. Harper and Bridges to Jacob Tees, of cash, at sundry times, to build the brig, two thousand two hundred and forty-eight dollars and twenty-one cents. The other items of the claim consist of the accounts of several persons for work or materials furnished for the said brig, all of which were contracted for by Messrs. Harper and Bridges, and on their credit and responsibility, and the greater part of which has been actually paid by them. More than half of Collins's bill, of four hundred and fifty dollars, is paid, and the whole of that of Baldwin for copper, amounting to fifteen hundred and eleven dollars and twenty-five cents. Soker's account for ship chandlery, of fourteen hundred and twenty-one dollars and forty-eight cents, is paid. Indeed, there remain unpaid of these accounts, only those of Hart and Flannegan, plumbers, for eighty dollars and sixty-two cents; and W. and S. Brown, riggers, for two hundred and two dollars and forty-four cents.

The claim of Messrs. Harper and Bridges, as they have put it forth in their libel, is as follows. They allege that, between the 22d February, 1834, and the 1st October, of the same year, at the request of Jacob Tees, who was building a new brig at

the port of Philadelphia, they did provide, furnish and deliver to the use of the said brig, divers spars, blocks, copper, nails, ropes, rigging and other materials, necessary in the building and rigging of the said brig; and, also, at the request of the said Jacob Tees, did procure and cause divers work, labour and services to be done in and upon the building of said brig, by riggers, painters, plumbers and others, by them the libellants employed and paid for that purpose; and also that they did advance large sums of money to the said Jacob Tees, to be laid out by him, and which were so laid out, in and about the building and rigging of the said brig. The first claim, which charges that the libellants themselves furnished the materials enumerated, cannot be maintained, as they are clearly not of the description of persons mentioned in the acts of assembly, as entitled to the benefit given by them. The last mentioned claim, to wit, for moneys advanced by them, to Jacob Tees, to be laid out in building the brig, is not now insisted upon as entitled to a lien and preference. Of course, the whole case turns on the second allegation, that is, that the libellants did procure and cause divers work, labour and services to be done in and upon the building of the said brig.

So the case stood at the argument, since which, on the suggestion of the court, an amendment has been made to the libel, alleging, in substance, that the petitioners did procure and cause to be provided, furnished and delivered to the use of the said brig, and which were used and employed in and upon her, certain enumerated materials necessary for her building. In short, in respect to the materials which are now the subject of controversy, the petitioners allege, 1. That they did, themselves, provide and furnish them to and for the brig; and 2. That they did procure and cause them to be provided and furnished by other persons, which persons were afterwards paid and satisfied therefor, by the petitioners.

The argument, on both sides, admits that the right of the petitioners must depend upon the provisions of the act of assembly of Pennsylvania, passed on the 27th March, 1784, and its

supplements. The title of this act declares its object to be, "to secure the persons employed in the building and fitting ships and vessels for sea, by making the body, tackle, furniture and apparel of such ships and vessels, liable to pay the several tradesmen employed in building and fitting them, for their work and materials." The preamble of the act declares, that the business of ship building is an important branch of the commerce of the state; that the "tradesmen employed in this business are liable to losses by reason, that the persons employing them are frequently masters of ships, strangers and persons having no fixed property in the country," and that the ships or vessels are not liable to pay the amount of their bills, "whereby their labour and materials have been taken to satisfy other debts." To remedy this evil, it is enacted, that "ships and vessels of all kinds, built, repaired and fitted within this state, are hereby declared to be liable and chargeable for all debts contracted by the masters or owners thereof for or by reason of any work done or materials found or provided by any carpenter, blacksmith and others for, upon and concerning the building, repairing, fitting, furnishing and equipping such ship or vessel, in preference to any, and before any other debts, due and owing from the owners thereof."

By the spirit as well as the language of this act, the debts to be preferred, are those which are contracted by the master or owner of a vessel, for work or materials found or provided, for the building of her, and the persons to be secured in the payment of said debts, are the mechanics and materialmen, by whom such work and materials are furnished and provided. These persons are to have a lien, a preference of payment, upon and out of their own labour and materials, which shall not be taken from them to pay other debts. Neither the policy nor the enactments of the law go beyond this; and the law is satisfied when the debts, described as the objects of its protection, are paid and satisfied. The courts of Pennsylvania, not considering such preference to be entitled to judicial favour, have given a strict construction, to a similar enactment in favour of

mechanics and others employed in building a house, in many cases; in that of Williams v. Tearney, (8 Serg. & Raw. 58;) in that of Hinchman v. Lybrand, (14 Serg. & Raw. 33,) and in that of Hills v. Elliott, (16 Serg. & Raw. 56.)

The parties to the contract protected by the provisions of the act, are declared to be the owner, or master of the vessel on the one side, and the person furnishing work or materials for her on the other. Indeed the latter are particularly described, as carpenter, blacksmith, mastmaker, sailmaker, shipchandler and others; so that it would seem, that the mere fact of furnishing and providing materials for a vessel, will not give the lien, unless done by some of the persons mentioned and described in the act; and the supplements afterwards enacted, to extend the protection to venders of sail cloth and lumber merchants, confirm this construction of the law.

The counsel of the petitioners, not denying this construction, has endeavoured to show that the contracts in question, although not made directly by the mechanics and materialmen with the owner of the brig, were so made virtually, by a fair legal implication and intendment. With whom did Mr. Collins, Captain Baldwin or Mr. Ker, make their contracts for the materials furnished by them for this brig? Who was their debtor? On whose responsibility did they part with their property? Did they know Jacob Tees in the whole transaction? Did they make any contract, directly or indirectly with him, expressly or by any legal implication? The whole testimony, to which I will generally refer, for there is no contrariety in it on this question, no ambiguity to be explained, shows directly and affirmatively the contrary. Tees was a man of no credit; a man they would trust for nothing; with whom they would have no such dealings, and would make no contracts. It is clear that these contracts were made, not with the owner of the vessel, but with Messrs. Harper and Bridges, on their personal credit and responsibility. The only contract with Tees, was made by the petitioners themselves, for their indemnity and security, but such a contract is also without the bounds of the

act, because they do not fall within the description of persons or creditors to whom the lien and preference are given.

But it is contended by the petitioners, that in making these contracts, they acted as the agents of the owner, and that thus the contract may be said to have been made, by the mechanics and materialmen and the owner, through the agency of the petitioners. The evidence does not sustain this view of the case; certainly the creditors did not consider that they were making contracts with the petitioners, as the agents of Tees, but for themselves and on their own account and responsibility. So they are charged in the bills. The petitioners never made any other suggestion, or pretended they were acting as the mere agents of another. This notion of agency is repudiated by all the cause. But, if it were so, how would it help the petitioners? Either as principals or agents, they have paid the bills; there is an end of the debt, so far as the materialmen are concerned; and it is to them that the benefits of the law are given, and not to agents who make contracts, who take upon themselves and guarantee debts, and afterwards actually pay them. From that moment it is a contract between the agent and the principal, either made before the contracts were made for the materials, or raised by the law on his paying and advancing the money for the principal. In either case it is not a contract, or a debt within the provision of the acts in question. The agent makes his contract and arrangement with his principal, for his services, or for his advances, in his own way, for such reward, or such security as they may agree upon, and they look to each other, according to the terms of their contract, for a faithful performance of their respective stipulations. But with all this, the act to encourage ship building and give a preference to mechanics employed in building vessels, has nothing to do. It is a common debt, a common contract between the parties, and to be recovered in the common way. It is also obvious, that in order to support the claim on this ground and to consider it as a debt of the owner, contracted by his agent with the materialmen, it is necessary to drop Messrs. Harper and

Bridges as the claimants, for, in their own right, for themselves, they cannot maintain it, and to put in their places, the persons that have been paid. How can this be done? They are answered at once; they are paid; they have no claim or debt, unsatisfied, either against Mr. Tees or his brig. They are no longer creditors, on this account, of the owner, or of the ship, or of Messrs. Harper and Bridges. Their debt is extinguished by the payment; it exists, for no purpose, against any body or thing. A new contract, a new debt, may have arisen by this payment between other parties; but the materialmen have no part or interest in it.

But, may the petitioners use the names and rights of other persons to enforce or recover their debt from Mr. Tees? Can they take to themselves, for their own use, the security which the law gave to the materialmen and mechanics, and to them alone? On what ground do they claim this right or this equity? If as agents, paying money for their principal, then it was the payment of the principal, and there is an end of the debt and the security given by the law for it, and of all the rights dependent upon a connection with the debt; if as sureties, paying the debt of their principal, it must be shown by some authority or established principle of law, that a surety, paying a debt in such circumstances, succeeds to, or may assume the privileges granted by the act of assembly to creditors and contracts of a different character and description. No debt is due to the surety until he pays the original debt, and then one arises, by implication of law, from his principal to him; but the same act, and the same moment that give birth to this new debt, are the death of that which is the object of legislative favour. They do not and cannot exist together. The surety has no debt until he has cancelled, annihilated the claim of the mechanic, nor can the security given for the payment of that debt, secure it. The letter of the law, the policy of the law is satisfied, when those persons for whose benefit they were enacted, are paid, and their contracts fulfilled. It never intended to carry on this

preference, to continue this lien, through all the channels of equity that may spring from the original transaction.

But if we were to admit that this right of preference, this privilege, is such a one as may be adopted, transmitted by an equitable implication, assumed at will; if it may be separated from the debt it was given and intended to secure, and be attached to another debt, another contract of a different character, with a different consideration, and between other parties, still it is a necessary preliminary, that the right should have existed in the persons from whom it is pretended to be derived. Here, then, we must return to the original debts and the original creditors, on whose rights the petitioners found their present claim, and we shall find that they were not contracted with the owner of the vessel, nor on his credit, nor the credit of the brig, but on a contract with the petitioners personally, and on their credit and responsibility, which, therefore, is not such a contract, nor such a debt, as falls within the provisions of the act of assembly. The persons, then, who furnished the articles in question, sold them to Messrs. Harper and Bridges, by whom they were delivered to Mr. Tees for the use of his brig. On such a sale no lien attached to the brig; no right of preference was vested in them; and, of course, none could be transmitted to the petitioners, by implication of law or otherwise.

Under these different views of the case, in no aspect in which it presents itself, can I discover any principle which will authorise me to comply with the prayer of the petitioners, and award to them a preference of payment, out of the funds now in court, arising from the sale of the brig, to indemnify them for the moneys they have actually paid for materials employed in building her. As to the small accounts, or sums, that remain unpaid, but for which they are responsible, they have not even the equity which attaches to the other cases; in fact, they have no debt, no claim, until they do pay.

The remaining part of the petition which prays for the remnant, or surplus of the funds in court, after paying and satisfying

the preferred debts, as reported by the auditor, will be the subject of the future consideration and order of the court.

The EXCEPTIONS were overruled, and the report confirmed.

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THE libel and petition of Messrs. Harper and Bridges, besides the prayer and claim disposed of in the opinion given by the court on the exception to the report of the auditor, contained a prayer that the surplus remaining in court, after satisfaction of the preferred claims, should be adjudged to be paid to them.

On this claim, on the 20th March, 1835, Judge HOPKINSON delivered the following opinion:

The libel and petition of Charles A. Harper and William C. Bridges, trading under the firm of Charles A. Harper & Co. prays, in the first place, that their claim and debt may be paid out of the moneys in court, proceeding from the sale of the new brig, as a preferred debt, in common with the other debts entitled to a preference under the provisions of the act of assembly of 27th March, 1784: and, in the second place, if that should be denied, that the surplus of said proceeds, remaining after the satisfaction of the claims adjudged to be paid, shall be paid to them.

The first prayer of this petition has been denied by the court, and the other is now to be considered and decided. This claim on the surplus or remnant of the proceeds of the sale of the brig, was presented to the auditor, and by him allowed and reported accordingly. It has been argued, that no exception having been made to this report, it is final, and, of itself, entitles the petitioners to the money. I cannot assent to this doctrine. The money in court is sufficient, as it always must be where there is a surplus, to pay all the petitioners, whose claims have been allowed, their respective debts. They are all satis-

fied, and have neither any interest nor right to interpose in the disposition of the remainder of the fund. There is, therefore, no party in court to take exception to the report of the auditor for the distribution of the surplus; but it is, nevertheless, the duty of the court to look carefully to the disposal of it. It cannot go out of the custody of the court, but by the action and order of the court, and no such order will be made, until the court is well satisfied that the party asking for it is legally entitled to it. It is not a derelict to be picked up by the first person who may lay his hand upon it; it has a legal owner somewhere, and to him only should it be transferred. The decree of the court, in such a case, will by no means follow the report of the auditor as a thing of course, because no exception has been taken to it; but must be made on the judgment and responsibility of the court, there being no parties whose consent will cure an error.

The power of a court of admiralty over these remnants or surpluses is not an arbitrary power, but is governed by principles, which the court is bound to observe before it acts, whether there be or be not a party in court, having an interest or disposition to obtain a proper distribution of them.

We have but few reported adjudications on this subject, but there is enough to put us on the ground, on which such claims should stand. I will advert to them, somewhat at large, because, this being the first case of this description that has called for my decision, I wish to have my views of it fully understood. In the case of The John, (3 Robinson, 288,) the facts were these. The ship was an American vessel, sold under a decree of the court for wages, which being paid, a surplus remained of about seven hundred pounds. A motion was made to arrest this money on behalf of Messrs. Wright & Co. who had supplied arms and stores to the ship, on a voyage from London to Venice. It was urged, for the claim, that, as it was a foreign ship, the party could have no other remedy. The application was supported by an affidavit of one of the claimants, which exhibited these facts: that, in the year 1798, the Ame-

rican ship John, R. Jackson, master, being in the river Thames, was chartered, on a voyage from London to Venice, with a cargo or freight; that American ships being then exposed to capture by the Algerines and the French, it became expedient that she should be armed for her defence, and have on board additional stores; that the master of the ship applied to the deponent's house to be furnished, with such arms and stores as he stood in need of, and they accordingly furnished them; that, without these supplies, the ship could not go on her voyage with safety, and without paying a heavy premium of insurance; that the supply of arms and stores was so furnished on the credit of her voyage, and on the assurance of the solvency of her owner, John Donaldson, of Philadelphia. The ship went on her voyage, and returned to London in 1799, when, on the application of the master, a further supply of stores was furnished. Repeated applications had been made to the agent or broker of the ship, as well as to the master, for payment, but no part could be obtained. When the ship was sold, a principal part of the arms and stores, furnished as aforesaid, remained on board and were also sold, and the proceeds thereof brought into court. The owner, John Donaldson, became insolvent; the master, Jackson, died in America; and the petitioners had no prospect of obtaining payment, unless the court would enable them to recover it out of the balance of the proceeds, arising from the sale of the ship, remaining in court. On these facts, the court thought there was a distinction in the case of foreign ships against which the party could have no other remedy; but there being an attachment of the proceeds on the part of another creditor, and, of course, a conflicting claim, the money was not to be paid to the petitioners until it was removed. Afterwards, this being done, the court said, that the cases had been looked up, and that it had continued to be the practice of the court to allow materialmen to sue against remaining proceeds in the registry; and the payment was decreed. The decree, it will be observed, was for supplies of arms and stores, necessary for the safety of the ship, furnished

by the petitioners, directly to her, in a foreign port, at the request of the master, on the credit of her voyage; and the court seems to have considered the petitioners to be, in fact, materialmen furnishing the articles in question directly to the ship. Certainly it was a case in which the master had the right to hypothecate the vessel, and, in a future case, we shall see the importance of this circumstance. This case of The John will further show, that a like decree was refused for a creditor, whose account was of a general and unsettled nature. It was as follows. In September, 1798, the ship arrived at London, from Philadelphia, with a cargo; and, by the master, Jackson, was put into the hands of the appearer, to collect the freights and do the necessary ship's business, as agent. She was chartered for Venice, and the outfit and insurance for that voyage, were paid by him, and he also, by the order of Jackson, insured the ship from Venice to London, and on her arrival made various disbursements and advances for her, which, with some other charges included in his account, made a final balance due to him of two hundred and ninety-six pounds, five shillings and ten pence. He further states, that the owner of the ship was bankrupt, and the master dead in America, and that he has no chance of recovering the balance, due to him, but from the proceeds of the ship remaining in court; that he had paid all the tradesmens' bills and demands against the ship, with some exceptions, for which he did not consider himself responsible, they being employed by said Jackson himself. The court rejected the petition, observing that the account was of too general and unsettled a nature to entitle the party to this remedy.

I find a case decided in this court, with much consideration, which confirms the doctrines of that just cited, and explains more fully the principles of the decision. I refer to that of Gardner v. The New Jersey, (1 Peters Ad. Dec. 223.) It was a suit for mariner's wages, in which a decree of condemnation was passed and the ship sold. There remained a surplus or remnant, after the payment of all the sums adjudged to be paid, with the costs and charges. The petition of the mas-

ter was presented, stating, that he had expended, during the voyage, for pilotage and mariners' wages, and other charges necessary for the ship's use, two hundred and fifty-seven dollars which remained unpaid; and that there was due to him, for wages as master, eight hundred and twenty-seven dollars. Another petition was also presented by W. Baldwin, stating that he was employed as physician in and for the ship, on her voyage, and that there was due to him for his services one hundred and sixty-seven dollars. The petitioners respectively prayed, that the sums due to them should be paid out of the surplus moneys remaining in court, after the payment of the sums decreed. The judge says, "when I first came into this court, I made, in several instances, distribution of surplus money, under the idea that I had power so to do, agreeably to the doctrine now stated (in the argument) to justify me in granting the prayers of the petitions: but, on experience, I found myself involved in many difficulties, in the application of this doctrine." He declares that he found it necessary to fix some general rules for his government in the distribution of surplus moneys, and determined "that it shall appear, that a sum claimed out of the surplus or remnant is, either of itself, or in its origin, a lien on the ship, or other thing out of which the moneys were produced." This rule, he says, is justified by the practice of the civil law, of the English chancery, and of the courts of common law. Proceeding on this principle he allowed the claim of the master for the sums paid by him abroad to the mariners, as well as for moneys advanced by him in foreign ports, which he considered to be liens for which the ship was hypothecated. Supplies afforded by materialmen and pilotage, are suable in the admiralty, and "if the master pays demands for those claims, he represents the claimants, and the lien continues on the moneys produced by the sale of the ship." I am not prepared to adopt the suggestion that the lien continued, either upon the ship or her proceeds, after the debt was discharged for the payment of which it was given; but it is enough for the principle, that the debt, in its origin, was a lien

on the ship: it was for necessaries furnished in a foreign port, for which the ship was liable, and for which the master had power to hypothecate her. The judge observes, that for materialmen and domestic pilotage, and the sums due on their account, he has generally referred the parties to the state jurisdiction, wishing to avoid collisions, "but for those furnished or paid in foreign ports, or here on ships on their voyage, and not at the port of outfit, the owners being resident here, I have reimbursed or distributed out of surplus moneys, where liens or hypothecations have appeared to me to have attached." On the same principle, wharfage has been allowed out of proceeds, as the wharfinger might detain the ship until payment. While therefore, the judge allowed the claim of the master to be paid, out of the surplus, for his advances made for the ship abroad, he refused his claim for wages, on the ground that "his contract was clearly personal, and made with and on the credit of the owners resident here, and not on that of the ship." In concluding his opinion he adds, "I deem it an exclusion from a distribution, or a claim to the surplus, unless a lien or appropriation is precedently and legally fixed, that those who claim such distribution could not sue in the admiralty for their demands." If, therefore, a lien or appropriation of the thing, or money proceding from it, is legally fixed, the party may claim the distribution, although the original demand was not such as could be sued for in the admiralty.

Adopting the rules or principles so well explained in the cases I have referred to, we must apply them to the case now under consideration. The claim of the petitioners to the surplus in question may be considered as resting on two grounds, either of which, if maintained, will entitle them to it. 1. The original debt. 2. The bill of sale made and executed by Jacob Tees, the owner of the brig, dated on the 23d November, 1833, by which she was sold and transferred to the petitioners.

1. As to the original debt. It began with a personal contract or arrangement made between Tees and the petitioners, by which they were to procure and furnish materials, and advance money

for the building and equipping of the brig, the details of which contract are set out in the deposition of Tees. It was altogether a personal agreement between the parties, giving no lien upon the vessel, and clearly not suable in the admiralty. In the performance of this agreement, the petitioners contracted for and purchased from various persons, certain materials to be used in the construction of the brig, but which were sold and delivered solely on the credit and responsibility of the petitioners, without any reference to or dependence upon the owner, or the brig, for payment. The whole transaction took place here, in the port where the vessel was built and the owner resided. The sale and delivery of the materials in question were, in truth, made to the petitioners and not to Tees; who, however, afterwards received them from the petitioners on such terms, for security and reimbursement, as they had previously agreed upon. It was an affair between themselves, in which the persons who furnished the materials had no part or concern. This case, then, differs in its essential features from that of The John. That was a foreign ship, whose owner was in a distant country, with whom no contract was made, and to whom no credit was given. The advances were made altogether on the credit of the ship and her earnings, and, if she was not made liable for repayment, the creditors had no remedy for the recovery of their demands. The arms and stores, in that case, were furnished by the petitioners directly to the ship, and the court considered them as materialmen, and not as merchants purchasing the articles from materialmen on their credit, for, in the final decree, the court, as the reason for it, says, "it has been the practice of the court to allow materialmen to sue against proceeds in the registry."

Nor will the claim of the petitioners, on the ground of the original debt, stand better on the principles adopted by Judge Peters in the case of Gardner v. The New Jersey. The debt due by the owner of the brig to Harper and Bridges never was suable in the admiralty, never was a lien on the vessel, nor can be so on the proceeds of her sale. The law never appropriated

the brig or her proceeds for the payment of their debt. It was the common case of money paid and advanced, and goods sold and delivered, by one man for the use of another, on a personal contract and responsibility to be sued for and recovered in a court of common law.

The remaining title, which the petitioners set up to sustain their claim to the money in court, is the bill of sale made by Jacob Tees to them on the 23d November, 1833, which, for a consideration of three hundred dollars, grants, sells and transfers to them "the hull of a new brig, now building by said Tees at his ship-yard;" and Tees further engages to finish her. Jacob Tees, in his deposition, says that he gave Harper & Co. that bill of sale as a security for payment of the money the firm advanced, and that he was to pay them two and a half per cent. besides the interest, or to take their notes at four months, without interest until due. The bill of sale on its face assigns and transfers absolutely to the petitioners all the right, title and interest of Tees in and to the brig, or, as explained by his affidavit, gives them a lien or mortgage upon her for the payment of the advances in money and materials made by them for her building. If, then, on the supposition of an absolute sale, the petitioners are considered as standing in the place of Tees, with all his rights, they would be entitled to the surplus money which remains after satisfying all the claims upon the vessel and her proceeds; especially in the absence of any conflicting claim or right to it. But the right of the petitioners stands equally strong on the other ground or supposition. The brig has been fairly and bonâ fide assigned or pledged to them for the payment of moneys advanced by them, in good faith, to the owner, and actually expended and applied in building her. They have therefore obtained a preference of any general creditor of Tees, even if such a one could come into this court for these funds. They show a "lien or appropriation" of the vessel, which was "legally fixed," and which gives them a precedence over any creditor having no such security or appropriation of this property for the payment of his debt; and the appropriation

follows the proceeds or the sale of the brig pledged and appropriated.

DECREE. It is ordered, adjudged and decreed, that the surplus and remnant of the proceeds of the sale of the new brig, after payment of all sums adjudged to be paid, and costs and charges, amounting, as appears by the auditor's reports, confirmed by the court, to the sum of thirteen hundred and nineteen dollars and sixty-six cents, be paid by the clerk of the court to the petitioners, Charles A. Harper and William C. Bridges, trading under the firm of Charles A. Harper & Co.

## DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

MAY SESSIONS, 1835.

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### THE POSTMASTER-GENERAL OF THE UNITED STATES
*v.*
### OWEN RICE AND SEBASTIAN GUNDT.

1. The postmaster-general has a right to require a bond from a deputy postmaster, for the faithful performance of the duties of his office, although such bond is not expressly required by law.
2. The equitable rule of limitation applied to bonds, where there has been no demand for twenty years, is a mere presumption of payment, not an absolute limitation.
3. The provisions of the act of 3d March, 1825, substitute a certified statement of the settled account, as evidence in suits against deputy postmasters, in lieu of the certified copy of the account current required by the provisions of the act of 30th April, 1810.
4. The provisions of the act of 3d March, 1825, releasing the sureties of a deputy postmaster where suit is not brought within two years after a default, do not apply to a default which occurred before the passing of the act.

ON the 26th February, 1816, John Appleback was appointed a deputy postmaster at Cherryville, in the state of Pennsylvania. At the time of his appointment, he gave bond to the postmaster-general, together with Owen Rice and Sebastian Gundt, the defendants, in the penal sum of six hundred dollars, conditioned for the faithful execution of the duties of his office, and the punctual payment to the postmaster-general of all moneys coming to his hands for postages. Mr. Appleback continued in office until the 1st April, 1820, at which time it appeared

that a small balance had been left unpaid at the termination of every quarter, from the period of his first appointment. His accounts were subsequently examined and adjusted at the post-office department, and, on the 15th June, 1831, a balance was certified to be due from him of fifty-one dollars and sixty-five cents. To recover this balance suit was brought against all the parties to the bond. Mr. Appleback was not found, but the defendants appeared and pleaded the general issue.

On the 19th May, 1835, this issue came on for trial before Judge HOPKINSON and a special jury.

After proof of the bond, the United States gave in evidence, though it was objected to on the part of the defendants, a statement certified under the seal of the post-office department, containing an account of the balance due from Mr. Appleback, on his post-office accounts, at the termination of each quarter, and the aggregate of these, amounting to the sum now claimed. The defendant, Owen Rice, proved that in the year 1825, long after this default of his principal occurred, but some years before this suit was brought, he had been himself appointed a deputy postmaster by the department.

The case was argued by GILPIN, District Attorney, for the postmaster-general, and SCOTT for the defendants.

GILPIN, for the Postmaster General.

This suit is brought on a joint and several bond to which the defendants are parties. It is a bond similar to those usually given at that time by a deputy postmaster, for the faithful execution of the duties of his office. It requires that officer expressly, "once in three months, to pay all moneys that shall come to his hands for postages, to the Postmaster General." That Mr. Appleback failed to do so, is proved by a certified statement under the seal of the post office department, which is declared by the thirty-first section of the act of 3d March, 1825, to be "evidence in all suits brought by the Postmaster General for the recovery of balances or debts due from postmasters." The liability of the defendants therefore under their bond is fully established. 3 Story's Laws, 1996.

Scott, for the defendants.

This is certainly a case of great hardship on the defendants, who are merely sureties, and one of whom at least is proved, by the act of the government, which, in 1825, appointed him a postmaster, to be a person of probity. Eleven years were suffered to elapse after the default of the principal was known, before the account against him was even stated, the deficiency communicated to his sureties, or a step taken for its recovery. Under these circumstances, the defendants are certainly entitled to avail themselves of all legal objections to this tardy claim. These are numerous; they relate to the bond itself, to the evidence of default, and to the time and mode of recovery.

This suit cannot be sustained in this court on this bond. It purports to be an official bond, taken by the Postmaster General, ex virtute officii; but all such acts are merely ministerial; they are the acts of an agent of limited powers; they cannot therefore extend beyond his powers. Now there was no law which authorised him to take this bond at the time he did so; the United States did not intend to exact such a guarantee from a deputy postmaster, or they would have so declared by law. The act of the agent, therefore, was neither within the letter nor spirit of his authority, and is void. If it be regarded as a mere voluntary bond, good at common law, though not by statute, then it is not sufficient to found this action on, in this court, for it does not present a case arising under the laws of the United States; a circumstance necessary to give this court jurisdiction. The case of the Postmaster General v. Early differs from this, in being a suit brought against a delinquent postmaster himself, not his sureties, and in being instituted in the circuit, not the district court. 12 Wheaton, 136.

But there is a fatal objection, even if the action on the bond can be sustained. There is no legal proof of default. The sole evidence offered on the part of the United States, is a paper, certified indeed under the seal of the post-office department, but which, in a controversy between individuals, would be worthless. By this mode, the United States at first assume

the settlement of the account, and then make their own settlement evidence of their claim. If they are to exercise such a privilege, they must at least do so in strict conformity with the law. By the twenty-ninth section of the act of 30th April, 1810, it is provided, that "certified copies under the seal of the general post office, of the accounts current of the several postmasters, after the same shall have been examined and adjusted at that office, shall be admitted as evidence." Such was the law at the time the contract was made, the bond given, and the default occurred. Now this paper is a mere abstract of balances due at the end of each quarter; it is not even an account; it contains not a single credit; much less is it an account current. It is not evidence under the law in question. By the thirty-first section of the subsequent law of 3d March, 1825, "certified statements of the accounts of postmasters, after the same have been examined and adjusted, are to be admitted as evidence;" but this law is not to have a retrospective effect and to affect accounts closed, as this was, five years before it passed. This paper, however, is not even such a statement; it was surely meant that a statement should show the court what the postmaster had received and what he had paid; it was surely intended that his default should be made manifest. That is not done here. All that we see is a mere memorandum of a debt, as made up at Washington; nothing that can pretend to be called a statement of the accounts. 2 Story's Laws, 1166. 3 Story's Laws, 1996.

Supposing, however, the bond to be sufficient, and the default to be proved; yet these defendants, being merely sureties, are discharged by the negligence of the public officers in bringing this suit. The bond was given on the 6th February, 1816, a default occurred on the 1st July, 1816, the suit was brought on the 18th June, 1831. Now if there were no express statute on the subject, so great a lapse of time would give a right to presume payment; this is especially so in the case of sureties, and it ought to be; here the principal, Mr. Appleback, has been suffered to escape; ten years ago he might have been

found and could have paid the debt; he now goes untouched, while his sureties are called on to pay his debts. But there is an express statute. By the third section of the act of 3d March, 1825, it is provided, that "if the Postmaster General shall fail to institute suit against a postmaster, who shall have made default, and his sureties, for two years from and after such default shall be made, then the sureties shall not be held liable to the United States, nor shall suit be instituted against them." Now in this case, more than two years did elapse, not only after the default was made, but after this law was passed, before the suit was brought; and of course the defendants are persons whom congress clearly meant to exempt. It is not a sufficient answer to say, that this construction gives to the law a retrospective character, and applies it to occurrences which happened previous to its passage. This effect was well known at the time. It was meant to change the existing policy; to carry into effect a new principle; and this congress had clearly a right to do. In our state and in New York, measures similar in principle have been adopted by the legislature, and the courts have not considered them as retrospective laws. To hold the reverse, would be to sustain the most palpable unfairness. The law of 1825, exempts every surety who subsequently gives bond, unless suit is instituted within two years after default; yet those who have previously done so, are to be held responsible for ever. To admit the rule, therefore, to apply to all cases, would be but to place them all on an equal footing; to apply it differently in one from another will be, not merely to violate its avowed object, but to do a great injustice. 3 Story's Laws, 1986. United States v. Kirkpatrick, 9 Wheaton, 720. Postmaster General v. Early, 12 Wheaton, 136. Commonwealth v. Duane, 1 Binney, 98, 601. Eakin v. Raub, 12 Serg. & Raw. 330. People v. Jansen, 7 Johnson, 332.

Gilpin, for the Postmaster General, in reply.

The right of an officer of the United States, to secure the payment of a debt that may become due to them, by receiving security which is voluntarily given, even though not required

to do so by law, seems to be too plain to admit of question; it is a means, certainly not illegal or improper, to attain an end contemplated by law; and a competent court would undoubtedly aid him in such a course. But in this case, the act of the Postmaster General is strengthened by usage and by law. To take bonds from deputy postmasters, for the performance of their duty, has been an invariable usage, and these bonds have been repeatedly the subjects of judicial decision. It is true, that before the act of 3d March, 1825, the Postmaster General was not required, in explicit terms, to demand them; but it is impossible to read the previous law of the 30th April, 1810, and not perceive that they were contemplated by it. The twenty-ninth section directs the manner in which suits are to be instituted, for "the recovery of balances due to the general post office, whether they appear by bond or obligation, or otherwise;" and the forty-second section expressly alludes to "the bonds given by deputy postmasters, for the faithful execution of the duties of their office." The same law authorises the Postmaster General to bring these suits. The act of 3d March, 1815, removes every doubt that this is the court in which he ought to proceed, for it extends its jurisdiction to all suits brought by any officer of the United States, under the authority of an act congress. 2 Story's Laws, 1166, 1168, 1531. 3 Story's Laws, 1986. Armstrong v. The United States, Peters C. C. Rep. 46. Dugan v. The United States, 3 Wheaton, 172. The Postmaster General v. Early, 12 Wheaton, 136.

The document offered to prove the default, is exactly that which the thirty-first section of the act of 3d March, 1825, means to make sufficient evidence; it is a statement of the account after settlement. The act of 30th April, 1810, required certified copies of the accounts current; this law requires a statement of them; a variation occasioned by the experience of fifteen years. The paper offered is not a mere statement of balances, as has been alleged, but it is a certificate of the account as it stood at the end of every quarter, settled and adjusted; it is not like a general balance, in which every thing is thrown

together, but there are items corresponding, as to the time of settlement, with those which must appear on the books of the postmaster, and consequently be susceptible of comparison and correction. Either this is what the law meant, or copies of the accounts on file must be given: that the latter are not intended is apparent from the change of the law: it follows that such a document as this is the evidence required. This provision differs essentially from that of the second section of the act of 3d March, 1797, on which a judicial construction has been placed by this court; there it is made necessary to produce "a transcript of the books and proceedings of the treasury;" that is similar to the former law, relative to the post-office, requiring copies of the accounts current, not to the present, requiring merely a statement; the decision of this court, therefore, in the case referred to, rather sustains than controverts the position now taken on the part of the United States. 1 Story's Laws, 464. 2 Story's Laws, 1166. 3 Story's Laws, 1996. The United States v. Patterson, ante, p. 44.

The objection as to the time at which the suit was brought, presents itself in two aspects; first, as affording a reasonable presumption of payment; and secondly, as showing such neglect on the part of the postmaster-general, as to bar his right of action. In answer to the first it may be observed, that twenty years of continued default is the shortest time which will raise even a presumption of payment of a bond. Here at most ten or eleven years elapsed; for though a default may have occurred earlier, payments and settlements were made by Mr. Appleback as late as April, 1820. No attempt, besides, is made to fortify the presumption of payment by any evidence. To the second point it is answered, that no laches on the part of an officer can affect the rights of the United States. It is true the defendants endeavour to relieve themselves from the operation of this principle, by referring to the third section of the act of 3d March, 1825, where the United States have themselves made their rights dependent on the conduct of their officers; it would relieve them were it applicable to their case; but it is not. To

apply it to the present case would be to make it retrospective; nay more, it would be to leave themselves actually without remedy, in every case of default, not prosecuted, which had occurred previous to the 3d March, 1825. Under no circumstances would it be proper to make such a retrospective application of a law. The point, however, is not left in the slightest doubt; the forty-sixth section of the same act expressly declares, that its provisions "are not to affect any existing debt or demand, due to the department, but that all such are to be adjudged, determined and executed according to the present laws." As regards this liability, therefore, of the defendants, no neglect has occurred to impair it, and if it is established by and arises out of the evidence, it still continues as a just foundation of the action. 3 Story's Laws, 1999. The United States v. Kirkpatrick, 9 Wheaton, 720. The United States v. Vanzandt, 11 Wheaton, 184. Dox v. The Postmaster-General, 1 Peters, 318. Locke v. The United States, 3 Mason, 446. The Postmaster-General v. Reeder, 4 Washington, 680, 687.

Judge Hopkinson delivered the following charge to the jury:

This is an action brought to recover a balance due by John Appleback. He was appointed postmaster at Cherryville in 1816, and then gave bond with the two defendants, who were his sureties, to pay over all balances of postage, and to perform correctly the duties of his office. When taken, there was no law requiring this bond; but it was the settled usage of the department to take such a one from every postmaster, on his appointment. In the case of The Postmaster-General v. Early, which has been so frequently referred to, it was made a serious question whether such a bond was legal, and whether a suit could be sustained on it. The supreme court decided that the postmaster-general had a fair right to take such a bond, and that, in case of default in paying over a balance of postage, the obligors were liable. That question, therefore, is now at rest.

The bond, then, is good. We next come to the account. That shows the various balances due and unpaid at the end of

each quarter. It was the only evidence offered on the part of the United States. At the time it was offered, it was objected to by the counsel of the defendants. I had some doubt as to its being such a "statement of the account" as the law of 3d March, 1825, contemplates; though it was certainly the intention of that law to substitute a statement of the settled account, instead of the copies of accounts current, which that of 30th April, 1810, required. I admitted the evidence, however, because the accounts current could be obtained from Washington, though with considerable delay and at some expense; and it was not alleged or pretended that there was any error of fact in the document offered. The point, too, is reserved for the benefit of the defendants; and they may have the advantage of a more deliberate argument, should they desire it. In giving your verdict, therefore, you are to consider this document as legal evidence of the facts it contains; and as such it establishes, primâ facie, the debt as due to the United States.

Have the defendants shown you that it has been satisfied, or that there is any circumstance to discharge them from their obligation to make it good?

Their first ground is lapse of time. In ordinary simple contract debts, a right of recovery is barred in six years; but this does not extend to bonds. In courts of equity, however, the same principle has been applied to bonds, but the period of limitation is settled at twenty years where there has been no demand; this, however, is not an absolute limitation, as in the former case, it is a mere presumption of payment. The defendants, therefore, cannot rely on this; twenty years have not elapsed; only eleven years on the last item, and but sixteen on the earliest default. Besides, no evidence of any sort has been offered to sustain this presumption of payment. I am clearly of opinion that there is no legal presumption that this debt has been paid.

The next ground is one of law also, and has been very fully argued. It dependson the effect which the proviso in the third section of the act of 3d March, 1825, has on this claim. The

argument of the defendants' counsel is, that it applies to previous cases, to cases occurring before the law itself was passed. That is not my opinion. Bonds were required to be taken by the postmaster-general for the first time by the law of 3d March, 1825, and this clause directing him to bring suit on them, within two years after default, applies only to those bonds. What the District Attorney says is perfectly true, that if it is to be applied to previous bonds, it will cut off the postmaster-general from bringing suit, in cases where there was no law requiring him to do so. Previous to the act of 3d March, 1825, there was nothing whatever which directed him to institute proceedings within two years; his delay was not illegal, and might be founded on reasons he thought sufficient; yet the defendants' construction would take from him all his remedy, on the ground of that delay.

The JURY found a verdict for the Postmaster-General for fifty-one dollars and sixty-five cents.

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THE UNITED STATES OF AMERICA

*v.*

THOMAS CADWALADER, ROBERT M'CALL AND THOMAS CADWALADER JUNIOR, EXECUTORS OF THE LAST WILL OF RICHARD M'CALL, DECEASED.

1. Where a public officer, not appointed or prohibited by law, is employed by the head of a department, his duties and compensation are to be regulated by the agreement made in the case.
2. No agreement made by the head of a department, with an agent appointed under the act of 3d March, 1809, will entitle him to more than the compensation allowed thereby.
3. A discretion is vested in the head of a department, to allow a special officer employed under it, compensation for his services even beyond the amount agreed upon, should he consider them equitably entitled to it.

4. Where the accounts of a public officer, employed by the head of a department under a special contract, are settled, and a certain rate of compensation allowed, he continues to be entitled to the same rate of compensation for similar subsequent services, until a new agreement or notice of change.
5. A claim for a credit, not actually disallowed, is to be considered only as suspended, if disapproved and passed over by the head of a department.
6. The regulations of a department of the government in settling its accounts, are intended for general rules in the transaction of its business, but are subject to the revision of a court and jury, when they work manifest injustice to individuals.

THIS was an action of debt, brought to recover the sum of eleven thousand six hundred and twenty-two dollars and sixty cents, which it was alleged Mr. M'Call in his lifetime had received from the United States for their use, and which was still due and unpaid by his representatives. To this action the defendants pleaded the general issue and a set-off, with leave to give the special matter in evidence.

On the 4th June, 1835, the case came on for trial before Judge HOPKINSON and a special jury, when the following facts were proved.

Early in the year 1815, Mr. Richard M'Call was appointed consul of the United States for the port of Barcelona. About the same time, a squadron was sent to the Mediterranean, and it was determined by the navy department to employ him as a special agent for this squadron, to be employed as long as his services should be considered necessary, and with authority to draw bills on certain houses in Europe. A letter of the secretary of the navy of the 7th March, 1815, fixes as his compensation for these services, "a commission of two per cent. on his disbursements, provided the whole sum so allowed should not exceed that authorized to be given to a navy agent," which was two thousand dollars per annum. Mr. M'Call did not consider this sufficient for the labours and responsibility of such an office, and, on the 12th April, the secretary of the navy, Mr. Crowninshield, agreed to extend the allowance by adding, "a commission of two and a half per cent. on absolute expenditures made when he should be absent from Barcelona, following the

squadron;" requiring distinct accounts of disbursements made under those circumstances. Mr. M'Call proceeded to the Mediterranean and commenced his special agency on the 13th July, 1815. From that time until November, 1817, his place of residence on land was at Barcelona, but he was frequently, and for considerable periods, either following the squadron, or at Carthagena, Marseilles, Mahon, or other places which the duties of his agency required him to visit. At the latter period he removed to Gibraltar, considering that the most convenient place for supplying the squadron, and thenceforth it became his place of residence. His accounts were made up at the end of every half year, and transmitted with the vouchers to the treasury department. The compensation which he claimed in these accounts, was always two and a half per cent. on all disbursements made by him for the public service, elsewhere than at Barcelona, and two per cent. on those made there, up to the sum of two thousand dollars per annum: he also charged the United States for the clerk hire, storage and office expenses, which were actually incurred. On the 20th June, 1817, the first settlement of his accounts took place at the treasury, and embraced only those from 13th July to 24th October, 1815: during the whole of that period he was absent with the squadron, and two and a half per cent. on all his disbursements were allowed. On the 25th May, 1821, the auditor having before him for settlement all the accounts from 25th October, 1815, to 1st July, 1820, referred to the secretary of the navy, Mr. Thompson, the claim of Mr. M'Call for two and a half per cent. on his disbursements, after he went to reside at Gibraltar, and also his charges for clerk hire, &c. there. On the 1st June, 1821, the secretary of the navy decided, that Mr. M'Call's compensation was to be regulated by the letters between him and the secretary of the navy, Mr. Crowninshield, in 1815, from which he thought "it fairly to be intended, that his compensation was not to exceed two thousand dollars a year, for all business transacted at his permanent place of residence. At the time the arrangement was made he resided at Barcelona, and

the just interpretation of the agreement was, that the same rate of compensation should apply as to all business at his permanent place of residence." He therefore declined allowing him more than at that rate for expenditures at Gibraltar after his removal to that place. On the 4th June, the auditor communicated this decision of the secretary to Mr. M'Call, and in the settlement made on the 22d May, 1822, the whole commissions from October, 1815, to July, 1820, amounting to thirty-one thousand three hundred and fifty-nine dollars and forty cents, were suspended. To this decision Mr. M'Call did not assent, and in 1824 came to the United States for the purpose of having the subject thoroughly investigated and disposed of, declaring at the same time that he should be obliged to relinquish the agency if his claims were refused. His disbursements for the navy department had then amounted to about two millions of dollars, and been attended with no loss to the United States. The subject of the suspended items was fully and carefully re-examined by the secretary of the navy, Mr. Southard, who differed in his view of it from his predecessor, and at the settlement made on the 31st December, 1824, the commissions before suspended, and an additional sum of twelve thousand and twenty-four dollars and twenty-five cents, for subsequent commissions, were carried to his credit: he was also allowed one thousand dollars for clerk hire, and eight hundred and ninety-five dollars for office rent and expenses annually. After this settlement Mr. M'Call resigned his consulate, but returned to Gibraltar and continued to execute his agency. His accounts up to the 1st January, 1828, were from time to time settled on the same basis. On the 3d March, 1830, the auditor having before him the accounts from 1st January, 1828, to 1st January, 1830, containing similar claims for commissions and office expenses, referred them to the secretary of the navy, Mr. Branch, stating that "for those allowances he found no authority in law, in the regulations of the navy department, or in any entry by the secretary upon the vouchers." On the 12th March, the secretary of the navy decided that Mr. M'Call was to receive the

same compensation as a navy agent while permanent, and when absent from his place of residence, that agreed on by the secretary of the navy, Mr. Crowninshield, in his letter of 12th April, 1815. On the 15th March, 1830, a settlement was made in accordance with this decision. Mr. M'Call, who had returned home, resigned his agency, and on the 21st April, 1831, a final settlement on the same basis was made at the treasury, by which a balance was asserted to be due to the United States of eleven thousand six hundred and ninety-three dollars and fifty-eight cents. This balance was made up of the following items:

| | |
|---|---|
| 1. Balance in Mr. M'Call's hands admitted to be due and tendered by him to the treasury, | $ 5,478 94 |
| 2. Commissions on disbursements at Gibraltar over and above the compensation of a navy agent, | 2,309 26 |
| 3. Commissions on bills of exchange, | 44 40 |
| 4. Office rent and charges for two years, | 3,790 00 |
| 5. Subsequent correction, | 70 98 |
| | 11,693 58 |

The case was argued by Gilpin, District Attorney, for the United States, and M'Call and Cadwalader, for the defendants.

Gilpin, for the United States.

This is a question of contract, of written contract. Mr. M'Call was not a navy agent, under the act of 3d March, 1809, whose character, duties and compensation are fixed by law; but a special agent of the navy department, chosen to perform a certain duty pointed out by that department, for which they agreed to allow him a certain compensation. The whole was reduced to writing, weighed by him for more than a month, modified at his suggestion, and again put in writing; he then entered on the stipulated duties. By this contract he must abide. It is found in the letters of himself and the secretary of the navy, Mr. Crowinshield, in March and April, 1815. He was to have the same allowance as a navy agent when at his place of per-

manent residence. After 1817, this was Gibraltar. In 1820, he claimed more while there; he claimed two and a half per cent. on all disbursements. In 1821, this was submitted to the secretary of the navy, Mr. Thompson, who refused it. In 1824, it was renewed and admitted; but still on the ground of this contract, not in opposition to it. That contract remained unchanged. It speaks for itself. If an erroneous construction was put upon it, the United States are not affected by it. In 1830, the same allowance is again claimed; it is refused as it had been in 1821, and this refusal obliges them to bring the present suit. The defendants make the same demand before this court, which Mr. M'Call made at the Treasury; the same reply is given; the contract does not authorise it. United States v. Lyman, 1 Mason, 504. United States v. Kirkpatrick, 9 Wheaton, 735. United States v. Macdaniel, 7 Peters, 1.

M'Call and Cadwalader, for the defendants.

If the accounting officers had received the evidence of Mr. Southard's construction of this contract, which has been submitted to the court and jury, they would never have refused these allowances. Their ground of rejection is, that there is no entry of his decision. The case is here to be passed upon with a full knowledge of it. That construction was unquestionably right; but if it were not, it is sufficient to sanction the items of set off which the defendants offer.

By the original contract, the compensation was fixed in two contingencies; the first, when Mr. M'Call was at Barcelona, there he had his consulate and its profits, as well as his own business, and the additional compensation of a navy agent was liberal and sufficient; the second, when he had to accompany the squadron, fix his residence for a greater or less time at other places, and sacrifice his own concerns for those of the public, for this he asked and was promised only the customary commercial commission of a merchant, two and a half per cent. The words of the correspondence in 1815, bear this construction, and it is consistent with usage and justice. As to the allowance for office expenses, it is made to navy agents in the

United States, and therefore falls within the the express stipulation of the letter; but if it were not, it is sanctioned by the usage of the department, which was confirmed by this court in a late case. To say that it was wrong in the secretary of the navy to allow, in 1824, what was rejected in 1821, is to confound together suspension and rejection; these claims were large, and in settling the account they were passed by for further consideration; they were not rejected; they came up in 1824, as matters yet undecided. The decision of Mr. Southard, therefore, was right in all respects, at the time it was made.

But that is not the question here. This claim commences four years after Mr. Southard's decision. It commences entirely, after Mr. M'Call had come to this country, conferred with the department, and returned to the Mediterranean with their plighted faith to allow it. The contract, made by the letters of 1815, was at an end; the settlement of 1824 became a contract, which had not been terminated by the government in 1830. No doubt the secretary of the navy might refuse these allowances after that time; but he cannot do so retrospectively; it has been laid down by this court, as well as by the supreme court, that no change in a usage is to be retrospective; that a person, who has for years received a compensation, cannot be deprived of it by the head of a department, who shall construe a contract differently from his predecessors. United States v. Macdaniel, 7 Peters, 1. United States v. Duval, ante, 356. Armstrong v. United States, ante, 399.

Gilpin, for the United States, in reply.

In 1815, a contract was deliberately made, between Mr. M'Call and the secretary of the navy, so explicit in its terms, that it cannot be misunderstood. The question is, whether or not that contract allows him two and a half per cent. commissions on all his disbursements at his place of permanent residence, and a regular annual sum of one thousand eight hundred and ninety-five dollars, for office expenses. On its face it certainly does not. At the time of the first settlement these allowances were not claimed; on the contrary, the commissions on disbursements at Barcelo-

na, were charged separately from those on disbursements while absent, and no claim was made for any office expenses. At the time of the second settlement, a similar distinction was made; but it was observed, that after his permanent residence was fixed at Gibraltar, he claimed the extra commissions; this was refused from the outset, and in 1821, was deliberately examined and rejected; it was not merely suspended, for the letter of the secretary of the navy is positive as to the meaning of the contract, and settled the point definitely so far as the department could do so; the suspension was to give time to ascertain the periods of absence and residence at Gibraltar, so as to adjust the accounts; there was no hesitation or suspension as to the propriety of the allowance; up to this time there was no claim even of an annual sum for office charges. In 1824, Mr. M'Call comes to the United States, and a third settlement is made; he puts in a claim again for the extra commissions during his residence at Gibraltar, and an entirely new one for office expenses, the whole amounting to sixty thousand dollars. This was allowed by the secretary of the navy, but not by any change in the contract; it was his interpretation of that instrument; there was no new contract, nor indeed any written order, given at the time, at least none has been found. This act then made no variation in the rights of either party; a claim was made by Mr. M'Call under his contract, at that time, and he obtained it. If this decision was wrong, it cannot affect the rights of the United States; it cannot change their written agreement with their agent; it cannot govern the construction of the instrument on a subsequent occasion. Whenever Mr. M'Call presented his accounts, they were to be settled by the officer for the time being, according to the existing contract; and if at one time an error was made, it is no reason that it should also be made at another; the settlements were from time to time, the contract was continuous; it existed in 1829, as much as in 1815, and alone governed each intermediate settlement. Now the very words of the letters confine the extra commission to disbursements made when absent from the place of permanent resi-

dence, and seem to place that item beyond question. As to the office charges, no proof of the same annual allowance to any navy agent was given; much less to a special agent, whose extra commissions gave him so large a compensation. Neither item, then, can be properly allowed under the agreement; and if the view is correct, that this agreement continued in force up to 1830, that no legal change had been made in it, and no new one formed, then the accounting officers were correct in rejecting them, and this jury ought not now to allow them.

Judge HOPKINSON, delivered the following charge to the jury:

(After stating the several charges of the United States against the defendant, which constitute the claim sought to be recovered in this action, and also, generally, the grounds on which it is resisted, the judge instructed the jury on the matters of law arising in the case, substantially as follows.)

The jury must bear in mind that the appointment of Mr. M'Call, to the duties of a navy agent, was not made under the act of congress of 3d March, 1809, and of course the question of his compensation for his services is not to be governed by the provisions of that law. Had his appointment been under that law, our course in the decision of this cause would be very plain and easy. We should follow the directions of the law, without regarding the acts or opinions of the secretary of the navy, as no agreements by him with Mr. M'Call, however explicit, if made in violation of the law, could be attended to here. The defendant, also, is presumed to have known the law by which his office was conferred on him, and to have known further that no contract made by the secretary with him, not warranted by the law, could be enforced in any court of the United States.

Mr. M'Call was not appointed by virtue of that act of congress, but under a general authority, lawfully exercised by the secretary of the navy, to appoint agents of the department, who are not, properly speaking, navy agents, nor officers of the

United States, but the agents of the secretary or his department. In such cases, where there is no statutory prohibition or limitation, a large discretion is allowed to the departments. In such appointments the duties of the agent, as well as his compensation and emoluments, must be regulated by the agreement made between him and the secretary. The duties and the compensation must wait upon the object of the appointment; they will vary according to the circumstances of each case; they may be permanent or temporary, more or less. We have, then, not to look to the law of 3d March, 1809, for the liquidation of this account, for our guide and rule in settling the claims of the respective parties, but we must look truly and conscientiously to the agreement between them, upon the faith of which the services of the defendant were rendered. The changes that have taken place in the office of secretary of the navy, have probably produced all the difficulties between the defendant and the department, but they can produce no change in any contract made within the authority of the officer who made it.

The original agreement is contained in a correspondence between Mr. Crowninshield, the then secretary of the navy, and Mr. M'Call. The several letters do not appear to me to be ambiguous, at least as regards the principal item of dispute, that is, the commissions or compensation to be allowed to the defendant; and my construction of them inclines to the opinion given upon them by Secretary Thompson, who had succeeded Mr. Crowninshield in the navy department. When Mr. M'Call rendered his first account to the department, or when it was there settled, Mr. Thompson was in office, and had the account settled according to his construction of the contract. If the duties and services of the appointment turned out to be more onerous, important and expensive than was contemplated when the contract was made, they nevertheless can have no operation in changing the meaning or construction of the contract, but they would afford a good and just reason for modifying it for the future, or for making a new and different one, or for the exercise of the secretary's discretion in making allow-

ances to meet these unexpected contingencies. Thus, if the contract had been made on the basis, that the residence of Mr. M'Call was to be at Barcelona, where living was cheap and commissions low, and where he had also a consulate, and it turned out that the public service required the navy agent to remove to Gibraltar, this would be a fair ground for a new contract, or for additional, equitable allowances. The secretary was not restricted to make no allowances but such as came strictly within the letter of the contract, if he should think there had been services performed, or expenses in that service incurred, not provided for by the contract.

It is unfortunate that the secretary who made the agreement was not first called upon to say what was intended by it. His construction would probably have been received as authentic by his successors. The accounts of Mr. M'Call were submitted to the auditor, and by him referred to the secretary, whose decision upon them I am inclined to adopt. It is said Mr. M'Call acquiesced in this decision. Did he do so? It is true he continued to hold the appointment, but to make strong remonstrances against that decision; and it is to be remarked that, in his appeal to the secretary, he takes the ground of his services, and not of the contract, to support his claims. This was correct.

Before Mr. M'Call again rendered his accounts to the department, another secretary, Mr. Southard, came into the office. Mr. M'Call renewed his charges, not only for the period between his first and second accounts, but introduced the very items that had been rejected or suspended by the former secretary. A question has arisen as to what items were rejected and what suspended. It is said that the charge of commissions only was suspended, but that, as to the other disputed items, the opinion of Secretary Thompson is clear, explicit and final. This may or may not have been his intention; but the suspension, as it appears on the account, goes to the whole of it; and we should presume that Mr. M'Call so understood it, as he would hardly

have preferred those charges again, in the face of Mr. Thompson's decision, had he continued in office.

The accounts of the defendant were submitted to Secretary Southard, who seems to have given them a full and careful examination, and finally he passed and allowed the accounts, admitting all Mr. M'Call's charges, not only for the period subsequent to his own coming into office, but for the antecedent time, allowing the items which his predecessor had refused or suspended. Mr. Southard must, like the defendant, have considered that these items were suspended, and not finally decided upon by Secretary Thompson. Although Mr. Thompson had given his opinion on the principle on which the account should be settled, yet the items affected by the principle were suspended, and not finally acted upon; they were not closed against future consideration and adjustment, by Mr. Thompson himself, or by a successor to his authority. Whatever may have been his reason for not directly applying his principle to the items in question, Mr. Southard believed, and I cannot say he was mistaken, that the whole account, when it came to him, was open for his examination and judgment; and he acted upon it accordingly. With my understanding of the original contract with Mr. Crowninshield, as I have intimated, I must consider that, in passing this account and allowing the disputed charges of the defendant, he did not proceed on the ground of that contract, for I do not see how it could bear him out; but that he did proceed on a ground equally tenable and firm, that is, by virtue of his general authority, as the head of his department, to exercise his discretion in making compensation to the agents of the department for their services, in conformity with his judgment and views of the justice of the case, after a longer experience and a fuller knowledge of the nature of the defendant's services, had enabled him to appreciate their value, and to estimate more correctly the expenses to which they exposed the agent.

But it is worthy of particular attention, that the account thus settled by Mr. Southard, which contained the very

charges formerly suspended or rejected, as it may have been, has been considered by the department to be finally closed; the defendant obtained his credits; they cannot now be disturbed, and no attempt is made by this suit to disturb them. If this suit had been brought for the allowances made by Mr. Southard, anterior to the settlement of 1824, we might have been called upon to look to and construe the original contract; but it is now unnecessary, as the accounts now in controversy, are subsequent to that settlement. Before these accounts of the defendant were presented to the department, another change had taken place in the office of secretary; Mr. Branch had succeeded Mr. Southard. The accounts are sent to the new secretary by the fourth auditor, with certain objections, or rather questions upon them. The result was, that Mr. Branch, going back to the original contract for the adjustment of the accounts, resumed the opinion of Secretary Thompson and adjusted them accordingly, as the District Attorney has submitted them to you, that is, refusing the defendant credit for the charges which Mr. Southard had allowed in the previous settlement of his accounts.

We have now arrived at the real question in this case, which is, are we at this time at liberty to go back to the contract between Secretary Crowninshield and Mr. M'Call, and to receive or reject the disputed items of his account, as we shall believe they are or are not warranted by the construction we shall put upon that contract; or, on the other hand, are we not bound by the allowances made by Secretary Southard, to the defendant in the settlement of his account in 1824, either, as a construction of the contract binding on the United States, or as constituting a new contract for the subsequent services of the defendant? With the opinion I have, and which I have already intimated, of the meaning of that contract, I cannot think that Mr. Southard admitted the charges in question by virtue of that contract; but that he considered them not to have been finally acted upon by his predecessor, that they were, therefore, open to his judgment upon them, and that after receiving the personal ex-

planations of the charges from Mr. M'Call, who had returned to the United States for the purpose of settling this account; after learning from him the real nature and extent of his services, and his extraordinary expenses in performing them, together with the change that had taken place in his situation and residence, and the importance and extent of his duties, the secretary took upon himself, as he clearly had a right to do, if the former secretary had but suspended these charges for further explanation, to make these allowances and fix the compenpensation of the agent, according to his view of the circumstances shown to him, in support of their justice and equity. In Macdaniel's case (7 Peters, 1,) it is said by the judge, delivering the opinion of the court that "it will not be contended that one secretary has not the same power as another, to give a construction to an act which relates to the business of the department." The court in that case fully recognise the discretion which any one of the great departments of the government must be allowed to exercise, in the distribution of its duties and responsibilities, and that while he regulates the exercise of his powers by the law, it does not follow that he must show a statutory provision for every thing he does.

In the case submitted now to this court and jury, we are not called upon to decide upon the right of Mr. Southard to admit the credits in question, whether they had been suspended or rejected by the former secretary. Whether Mr. Southard was right or wrong in his action upon the account which he settled with the defendant in 1824, and in his allowance of credits to the defendant in that account which had formerly been withheld, is, at this time and in this suit, of no importance. This suit is not brought by the United States to recover back the money, credited and allowed to the defendant by that settlement, upon the allegation, that the secretary transcended his power in allowing those credits, or on any other allegation. No attempt is made to disturb that settlement. This action is now brought to recover from the defendant the money which he retains for his compensation and charges, for services and ex-

penses subsequent to that settlement, and in strict conformity with the allowances that were made to him by the secretary, in that settlement. Then the question is, if it can be called a question, had the secretary a right to make a contract or arrangement with his agent, acting under and by his authority, performing the services of the department under his direction and controul, for the compensation for these services and for the expenses for which he was to be allowed in performing them? If the secretary had this power, if he has made this contract with the defendant, and the defendant, upon the faith of the contract, has gone on to render his services and to disburse his money in the public service, it is for us to inquire, whether Mr. Southard has exercised his discretion discreetly or not; whether he has been too liberal or not in the terms he gave to his agent. That such an arrangement, such a contract, was made, seems to me to be proved beyond a question by the testimony of Mr. Southard, and of Mr. Watkins at that time the fourth auditor of the treasury department, in addition to the evidence afforded by the settlement itself. On the faith of this agreement, Mr. M'Call resigned his consulship at Barcelona, returned to Gibraltar, resumed the duties of his agency, and devoted himself to them. No question has been made of the fidelity and ability with which he performed these duties.

You will observe that this case comes before you, on a more free and extensive ground than it stood at the department, when these credits were refused. The officers of that department looked at the case only as it appeared on their books and records; they decided it by their regulations for the settlement of accounts, which are intended only for general rules in the transaction of the business of the office, and for the government of extraordinary cases. The courts have often revised the decisions made by the strictness of these regulations, where they worked manifest injustice to the individuals concerned. The accounting officers of the department, in this instance, took up the original contract as it appears in the correspondence between Secretary Crowninshield and the defendant; they put

their construction upon it, with which I do not find fault, and they stopped there. As they found nothing on their books and records of the subsequent proceedings of Mr. Southard, they paid no attention to them. It is our duty, however, to go further into the truth and justice of the case, and to decide upon the rights of the parties by the laws of the land, and not by the office rules of a department. Upon these principles of law, applied to your own views of the evidence, you will make up your verdict. The defendant admits a balance to be due from him to the United States of five thousand four hundred and seventy-eight dollars and ninety-four cents, which he has always been ready to pay. The United States claim from him the sum of eleven thousand six hundred and twenty dollars and sixty cents, with interest amounting to thirteen hundred and twenty-eight dollars and thirty-one cents. The difference is made by the disputed items in the defendant's account, upon which you are to decide.

The Jury found a verdict for the United States for five thousand four hundred and seventy-eight dollars and ninety-four cents.

## DISTRICT COURT OF THE UNITED STATES.

### Eastern District of Pennsylvania.

AUGUST SESSIONS, 1835.

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JOSIAH REEVES AND ISAIAH TOY

*v.*

THE SHIP CONSTITUTION.

1. A hirer, having charge of the property of another, is answerable for an injury which is caused by the omission of that care which a man of common prudence would have taken in his own concerns.
2. An owner of property let out to hire, is not entitled to indemnity for an injury it may sustain in the service in which it is used, unless such injury is caused by an abuse of it, or by such negligence as brings responsibility upon the hirer.
3. Where a steamboat was hired for the purpose of towing a vessel, to which she was fastened, and both were under the direction of a licensed pilot, the owner of the steamboat is not entitled to damages on account of injury sustained in the course of the navigation, and not caused by undue negligence of the pilot.
4. Where two vessels run foul of each other, without blame on the part of either, the loss must be borne by that on which it falls; if both are to blame it must be apportioned between them; if it is by the fault of one, that must make full compensation.

ON the 7th August, 1835, the steamboat William Wray, belonging to the libellants, was employed in towing the ship Constitution, to which she was fastened, up the river Delaware. There was a licensed pilot on board of the ship, under whose directions both vessels were steered. In the course of

the passage, they came in contact with a schooner, sailing on the river, by reason of which the steamboat sustained considerable injury, and the libellants now claimed compensation and indemnity for this damage.

On the 28th September, 1835, the case came on to be heard before Judge HOPKINSON. It was argued by LEX and GERHARD for the libellants, and CHESTER for the respondent.

The counsel for the respondent offered the deposition of the pilot in evidence, which was objected to by the counsel for the libellants, who cited 1 Starkie Ev. 110. 3 Starkie Ev. 1732. Moorish v. Foote, 2 Moore, 508. Cuthbert v. Gostling, 3 Campbell, 515.

Judge HOPKINSON directed the deposition to be read; observing, that if, on a further examination, the objection to it should be found to be good, it would be laid aside in the decision of the cause.

LEX, for the libellants.

This is a case of bailment. The owners of the ship are answerable for the want of skill or care in the pilot, although he is not chosen or appointed by them. Bussey v. Donaldson, 4 Dallas, 206.

CHESTER, for the respondent.

The ship Constitution, at the time of the accident which occasioned the damage, was in the hands and under the government of a licensed pilot, in the river Delaware. There was no fault, negligence, or ignorance on his part by which the harm was done. If it were otherwise the owners of the ship are not answerable for it. The pilot is not their agent, but an officer of the port, into whose custody and care they were bound to put the vessel. 1. The master and owners of a ship are not answerable for the default or want of skill of a pilot. He is not their agent, but a public officer. They are obliged to take him and give up the ship to him. 4 Smith's Laws, 73. 76, 77. The William, 6 Robinson, 317. 2. The damage did not occur by any neglect of the pilot. The

Woodrop Sims, 2 Dodson, 83. Caruthers v. Sydebotham, 4 Mau. & Selw. 77.

GERHARD, for the libellants in reply.

The pilot is the agent of the owners for the purposes of this action. 4 Smith's Laws, 77. Fletcher v. Braddick, 5 Bos. & Pull. 182. The Neptune, 1 Robinson, 467. The Eliza v. The Decatur, 1 Wharton's Dig. 679. Snell v. Rich, 1 Johnson, 305. This is a case of bailment. The steamboat was hired to the owners of the ship, and put wholly into their possession, and at their disposal. It is not the ordinary case of one vessel running foul of another. Story's Bail. 264.

Judge HOPKINSON delivered the following opinion:

The libel sets forth, that in August last the steamboat William Wray, owned by the libellants, engaged in trading between the port of Philadelphia and the port of Camden in New Jersey, and in towing vessels from foreign ports to the port of Philadelphia, was a tight and well built steamboat of the burden of ninety tons or thereabouts, and completely found and furnished. That she had on board the master, Frederick Roth, and three mariners, being a full complement to navigate her. That on or about the 7th day of August last, the said steamboat was employed by the master of the ship Constitution, for the purpose of towing her to the port of Philadelphia, from a place on the river Delaware called Fort Mifflin; the said ship having arrived from ports beyond seas. That the said steamboat was lashed along side of the said ship Constitution, on her starboard side; after which the steamboat was, by her master, delivered into the care, guidance, and management of the pilot, who was then on board of the ship, and who had the sole control of the said ship, from the time of his boarding thereof until the said ship should arrive at the port of Philadelphia. That the said steamboat being so delivered into the charge of the pilot, the said ship and steamboat were thereafter and at the time of the damage hereafter

mentioned, and until the arrival of the said ship and steamboat at the port of Philadelphia, controlled and steered by the said pilot. That whilst they were proceeding to the said port, and whilst at or about a part of the said river opposite to the said port, a schooner, her name unknown to the libellants, was perceived nearing into shore, and athwart the path of the ship and steamboat, and thereupon the captain of the steamboat advised the pilot, so steering the ship and steamboat, to pass astern of the said schooner so nearing into shore. The libellants aver that if this had been done no damage would have happened; but the pilot, not heeding this advice, but either from malicious obstinacy or want of skill or power, refused or neglected so to do, and so steered and managed the ship and steamboat, that the steamboat was forced into contact with the said schooner. The damage done to the steamboat is then detailed, and a decree prayed for the damages of the libellants.

The answer of Josiah Wilson, master of the ship *Constitution*, admits the employment of the steamboat for the purpose mentioned in the libel, the ship then being in the river Delaware, about four miles below the city, and being then under the sole management and control of one Richard Westley, a regularly licensed pilot, from the said place about four miles below the city, up to the said city. The respondent believes that the steamboat, under the command of one Frederick Roth, did proceed to the ship at the place aforesaid, and tow her up to the city. A bill, charging at the rate of five dollars per hour, during all the time the steamboat was employed, was presented to the respondent for the services then rendered by the steamboat, and was paid by him in full. The respondent was not on board of the ship or steamboat at the time the services aforesaid were performed. He does not know how the steamboat was furnished or manned. He is a stranger to all the other matters and things contained in the libel, but says that they are insufficient to entitle the libellants to the relief prayed for.

Frederick Roth, the master of the steamboat, testified that he

lashed the steamboat fast to the Constitution on the starboard side, about four miles below the city. He started the engine and gave way to the ship. As soon as the pilot had the ship in command, so that he could take charge of her, and had headway on her, the witness gave up the ship to him. He had charge of the ship and steamboat all the way up; the helm of the steamboat was pinned straight. The witness said to the pilot, that the ship was now in his charge, and that he gave her up, boat and all, to his command; that he could steer them where he pleased; and that if any accident happened it should be attached to the ship, to which they should look for damages. He proceeds: we came along near to South street; the schooner was shorting in to town; she had a small boat ahead towing her, with no sail set; we were about a square from her; I ran from the steamboat on to the ship, and told the pilot he had better go astern of her, or she would be foul of us. He halloed to the man at the helm to starboard, thinking that he could go ahead of her. Putting the helm starboard, shot the ship and steamboat into town. There was sufficient room to go astern. He then describes the damage done to the steamboat by coming in contact with the schooner; it was done by the flying jib-boom of the schooner. He added, that if the pilot had said, stop the engine, it could have been done, but without his permission he could not do it. The ship, at the time of the accident, was within four or five feet of the wharf. These are the material facts testified on the part of the libellants. A replication was filed by them, admitting the payment of the sum mentioned for the hire of the boat, but denying that it was in satisfaction of the damages received by her.

Edward Maule, a witness for the respondent, says that he was on board of the ship; that they got up near Almond street wharf; that some vessels were lying at anchor and some under way on the eastern side of the channel; there was a schooner ahead, with a boat towing her into the wharf; the pilot of the ship halloed to the captain of the schooner, and told him to stop; he would not, or did not hear the pilot; the ship took

the straight course up; she had to go inside of the schooner. The witness thought there was room enough to go inside of her without touching her, and that if the schooner had had her jib-boom rigged in, they whould have done so; that they could not have gone astern of her without running into more vessels than they did; there was no chance at all of going astern of her. When the schooner came in contact with us, we were very near the wharf, within six or seven feet; it was just high water, and the schooner had a boat ahead towing into the wharf; it was the schooner's fault that she came in collision with the steamboat; if she had stopped one half minute, we should have gone clear of her. The witness was standing, with the pilot, on the round-house of the ship; he did not hear the captain of the steamboat give any advice to the pilot, there was so much noise that he could not hear it if he had; heard him say something, but did not attend to him. The witness was a passenger on board of the Constitution; he came to Philadelphia to get a branch to be a pilot; he has got it.

Frederick Roth was called again, and said that there were three sloops lying at anchor astern of the one coming in; there was fifty yards distance between the schooner and the nearest of the sloops at the time we struck.

On these facts several questions of law have been raised and argued, some of which it may not be necessary to decide. Before we examine how far the having a regular licensed pilot on board the ship, acquits her owners of all responsibility for an injury her navigation may have done to another, we must determine whether this is a case which entitles the injured party to redress from any body, or is one of the class, mentioned by Sir William Scott, which, happening without blame, must be borne by the party on whom it has fallen.

This is not the case of two vessels running foul of each other, in which the question would be, whether it happened without blame in either, and if so, then, as I have said, the loss must be borne by the party on whom it has fallen; or if both are to blame, then the loss is to be apportioned between them; or, if

by the misconduct of the suffering party, he must bear it; if by the fault of the ship doing the injury, the injured party must have full compensation. (The Woodrop Sims, 2 Dodson, 83.)

The counsel for the libellants have argued, and I think rightly, that it is a case of bailment, or hiring for a reward, and, of course, will be governed by the law of such a case. I shall so consider it; and if, on the established principles of such a case, the libellants are entitled to indemnity for the loss they have sustained, then the question will occur, whether the owner of the ship is relieved from this responsibility, because, at the time of the injury, his ship was under the management and controul of a regularly licensed pilot of this port. Assuming that this is a case of bailment, in which the owner of the ship hired the steamboat for a stipulated reward, to be used for a certain purpose, what is the obligation of the hirer, in case of loss or injury to the thing hired happening, while employed in the service for which it was hired? The opinion of Lord Chief Justice Holt, in the case of Coggs v. Bernard, (2 Lord Raymond, 919,) is well known to the profession, as containing a learned and generally exact treatise upon the whole law of bailment. It continues to be the leading case, the received text upon this important subject. In speaking of goods hired out, the Chief Justice says, "if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses." In the treatise of Espinasse on the law of Nisi Prius, (2 Espinasse, 253,) the law is thus given; "the hirer is to take all imaginable care, and if, notwithstanding, the thing be lost, he is not liable." In the beautiful, lucid and satisfactory essay on bailments by Sir William Jones, he examines both of these opinions in his clear and discriminating manner, and shows that they are founded on an error, really confounding the case of a hirer, with that of a borrower, contrary to the obvious principles of justice, and destroying the distinction between them which Holt himself desired to establish. I quote from Sir William Jones, at page 120. "This contract," he says, "is advantageous to both parties, and the harmonious consent of

nations will be interrupted, and one object of this essay defeated, if the laws of England shall be found, on a fair inquiry, to demand of a hirer a more than an ordinary degree of diligence. In the most recent publication that I have read, on any legal subject, it is expressly said 'that a hirer is to take all imaginable care of the goods delivered to him;' the words 'all imaginable,' if the principle before established be just, are too strong in practice even in the case of a borrower; but if we take them in the mildest sense, they must imply an extraordinary degree of care; and the doctrine, I presume, is founded on that of Lord Holt, in the case of Coggs v. Bernard, where that great judge lays it down, 'that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses.' It may seem bold to controvert so respectable an opinion, but, without insisting on the palpable injustice of making a borrower and a hirer answerable for the same degree of neglect, and without urging that the point was not then before the court, I will engage to show, by tracing the doctrine up to its real source, that the dictum of the Chief Justice was entirely grounded on a grammatical mistake in the translation of a single Latin word." After going through the proof of his criticism, he adds, "there is no authority, then, against the rule which requires of a hirer the same degree of diligence, that all prudent men, that is, the generality of mankind, use in keeping their own goods." In page 167, the rules are given, which are the result of the preceding principles and authorities maintained by this author. He says, "when the bailment is beneficial to both parties, the bailee must answer for ordinary neglect;" and at page 169, "the hirer of a thing is answerable for ordinary neglect;" and, going back to page 166 for the definition of ordinary neglect, we shall have the whole law of the subject before us; "ordinary neglect is the omission of that care which every man of common prudence, and capable of governing a family, takes of his own concerns." To illustrate the meaning of this definition, we may add that which is given of slight neglect, which is said to be

the "omission of that diligence which very circumspect and thoughtful persons use in securing their own goods." This is not required of a hirer, although it is of a borrower; and if this distinction is taken away, there will be none between them. The negligence of a borrower is construed rigorously, and, although slight, makes him liable

This being the law of the case before us, we are to look to its facts, as they are given to us by the evidence, to decide whether the conduct of the pilot, who had the charge of the ship, when the injury complained of was done, was such as to subject him to the charge of ordinary neglect; of the omission of that care which a man of common prudence would have taken in his own concerns. In doing this, we must distinguish between the facts stated by the witnesses, and their opinions, more especially the opinions formed or declared after the misfortune happened, and which have, naturally, been more or less influenced by that event.

The ship had come up from about four miles below the city, towed by the steamboat, with a flood tide which left her about the time of the accident. As she came near to Almond street or South street, being within a few feet of the wharf, not farther than fiveor six feet, she found a schooner, with no sails set, going in, towed by her boat. On the outside, some vessels were lying at anchor, and some under way, and the pilot of the ship was called upon at once to decide whether he would continue on in his course and endeavour to pass ahead of the schooner, that is, between her and the wharf, or go astern of her. He elected the former; and, in making the attempt, the jib boom of the schooner came in contact with the steamboat, and inflicted the injury for which compensation is now claimed.

Do these facts make out a case of such negligence as will entitle the libellants to the indemnity they seek? I should say, they do not; for, supposing the pilot acted with good faith, and with his best judgment, which is not questioned, and granting that he misjudged, and miscalculated his chance

of getting clear of the schooner, yet it was a mistake which, in such a situation, where the chances were so nearly balanced, as we shall see, the most prudent man might have made in his own concerns. It discovers no such want of diligence as to be imputed as a fault in any man. He saw danger and difficulty on both sides; two evils to be avoided; he honestly, with his best judgment and skill, endeavoured to avoid both, and betrayed neither carelessness nor ignorance in the attempt, although it was not successful. It is not uncommon for the best and wisest designs to miscarry.

We have, however, evidence in the case, on both sides, to give a more distinct character to this outline. This evidence consists, in part of facts, and in part of the opinions of the witnesses. For the libellants, Frederick Roth, the captain, as he is called, of this steam ferry boat, has testified, that when they were about a square from the schooner, he told the pilot he had better go astern of her; that "she would be foul of us;" that the pilot halloed to the man at the helm to starboard, thinking he could go ahead of her; and that there was sufficient room astern. On the other hand, Edward Maule, who was a passenger on board the ship coming to Philadelphia, to get a pilot's branch, and did get it, testifies that he was standing, with the captain, on the round house of the ship, and did not hear the master of the steamboat give any advice to the pilot; that there was so much noise he could not hear it if he had; he heard him say something. This is the testimony intended to inculpate the pilot, because he neglected the advice that was given him. It is probable that he did not hear it; he made no answer to it. But if it be granted that he did hear it, was he bound to obey it against his own opinion? Might he not, nevertheless, exercise his own judgment without falling under the censure and penalties of malicious obstinacy, or culpable negligence, or want of skill. The pilot thought, and so says Roth, that he could go ahead of the schooner, and if he did think so, he had a right to act upon that opinion, upon his own view of the emergency, unless it were so clearly

erroneous and absurd, that a man of common prudence would not have so thought and acted. Roth thought that he had better go astern of the schooner, and that if he did not, she would be foul of them; and it was also his opinion that there was sufficient room for them astern. In these opinions he was not only opposed by the pilot, as manifested by his conduct, for I have not taken his deposition into the case, but also by the witness Maule, who, as far as we know, has neither an interest nor feeling in the event of this suit, and whose profession as a pilot, and position at the time of the accident, give to his opinion at least as much weight as is due to that of the master of a ferry steamboat, in a case in which we can hardly suppose he does not feel some bias, in his opinions not his facts, for his owners and his boat. Maule says that the pilot of the ship halloed to the captain of the schooner to stop; this was not indifference or inattention; but he would not, or he did not hear. He says that the ship took the straight course; that she had, or was obliged, to go inside of the schooner, and he thought there was room enough to do so without touching her, and there would have been if her jib boom had been rigged in. He thought that they could not have gone astern without running into more vessels than they did; that there was no chance of going astern of her. He says, that it was the schooner's fault that she came in collision with the steamboat; if she had stopped one half minute, we should have gone clear of her; and, I may say, the manner of the contact and injury proves this to be true. These are the opinions of Mr. Maule, and I cannot say that they are not entitled to as much weight, at least, as those of Mr. Roth. I may remark that if Roth, who says he did see the danger of going on, had stopped his engine, he would have saved his boat; but he chose to stand stiffly on his neutrality, although he could have incurred no responsibility by doing what he saw or thought the necessity of the emergency required. We see that points of etiquette are not confined to great affairs, but may do mischief between a pilot and the master of a ferry boat.

If we may not place this disaster in the chapter of accidents inculpating nobody, where shall we put the blame? On the pilot, the schooner, or the steamboat? The event has shown that either of them might possibly have prevented it. It is enough for our purpose to inquire whether it is imputable to the pilot, and was occasioned by his neglecting to do what every man of common prudence, capable of governing a family, would have done in the same circumstances. The libel charges him with a higher fault than this, with a 'malicious obstinacy' in not heeding the advice of Mr. Roth, and with want of skill and power in not passing astern of the schooner. But we have seen that, on the evidence, it is doubtful whether the advice of Roth would not have been followed by worse consequences than those which did happen, and, in such a case, I cannot agree that the pilot was guilty of obstinacy, or even erred in judgment in not submitting to it; nor do I see with what justice I can charge him with want of skill for a course of proceeding approved, nay thought indispensable, by a disinterested and competent judge of the case. He is opposed only by the master of the steamboat, confirmed, as far as he is so, by the accident that attended the course that was taken. The serious charge of obstinacy, ignorance and culpable negligence should not be heaped on a man whose living depends on his fidelity, skill and care, without clear and satisfactory evidence; much less should it be inferred, because the event was unfortunate, and most especially in a case in which the expectation and judgment of the accused party came within half a minute of being verified, and when it would have been verified if the captain of the schooner had heard and attended to the reasonable request of the pilot, a compliance with which he had a right to expect, without any impeachment of his prudence. If he had adopted the advice of Mr. Roth, and gone astern of the schooner, and, in doing so, had got foul of the vessels lying there, the charge of negligence or want of skill would have been sustained against him, by the opinion and evidence of Mr. Maule, at least as forcibly as it now is by the testimony of Mr. Roth. It was

a case of very close calculation, in which an error might have happened to any man. If the ship and steamboat had been half a minute more in advance, they would have passed the schooner untouched; if half a minute later, the schooner would have passed them without injury. We should have a rule of negligence much more strict and severe than Lord Holt's, if we were to apply it to such a case. Even a borrower would hardly be liable in such a case, as may be inferred from the examples put by Sir William Jones, in which the articles loaned were undeniably exposed to greater danger than usage, or prudence, or the reasonable expectation of the lender would justify. The owner of a thing let out to hire must not suppose that he is to be indemnified for every injury it may sustain in the service it is put upon. The reward paid for it is presumed to include, not merely a compensation for the use of it to the hirer, but also for the ordinary wear of it, and the risk attending the employment, unless it be produced by an abuse of it, or by such negligence as brings responsibility upon the hirer. The owner of a ship, who lets her to hire, knows that she is to encounter the perils of the sea, injuries from tempests, and various accidents and losses that belong to the service in which he has hired her, and that must be borne by himself. So the man who hires to another a carriage or horse, knows that he exposes them to certain dangers; that the one may be broken and the other become lame, without any fault or abuse on the part of the hirer; and the owner is his own insurer for such losses. In fixing his compensation he is presumed to take them into consideration, and probably does so. A hired carriage may come into collision with another and be broken, without a culpable negligence in the driver; a horse may be ridden moderately and be judiciously taken care of, but he may fall lame or be foundered.

It is therefore my opinion, that the libellants are not entitled to any compensation or indemnity from the respondent, for the injury and damage done to their steamboat, complained of in their libel.

Decree. That the libel be dismissed with costs.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

NOVEMBER SESSIONS, 1835.

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JOHN BRONDE, JAMES DOVE, AND WILLIAM MOORE

*v.*

THOMAS A. HAVEN, OWNER OF THE BRIG CAROLINE.

1. Seamen have a triple security for their wages, the vessel, the owner, and the master.
2. The owner of a vessel, although his name is not stated in the *shipping* articles, is liable for the wages of a seaman.
3. The sale of a vessel by the owner, subsequent to the making of the shipping articles, does not discharge his liability for the wages of a seaman, even though the voyage was not terminated, or the wages were not demanded, previous to the sale.
4. Where a vessel which arrives at a foreign port, discharges her cargo, and remains there some time after the discharge, is lost on the homeward voyage, the seamen are entitled to their wages up to the time of the discharge, but not for half the time she afterwards remained in the foreign port.

THIS case was argued by GRINNELL, for the libellants, and HALEY, for the respondent.

On the 15th January, 1836, Judge HOPKINSON delivered the following opinion:

The libel sets forth that the libellants, severally, on the 30th July, 1833, at the port of Philadelphia, at the request of Jacob A. Warnack, master of the American Brig Caroline, of which Thomas A. Haven was then the owner, shipped as mariners to

perform a voyage from the port of Philadelphia to the river La Plata and other places, for the term of twelve months, unless sooner discharged in a port of the United States, at the following monthly wages; John Bronde fourteen dollars, James Dove, and William Moore thirteen dollars each. The libellants further allege, that they proceeded on the said voyage from Philadelphia to the port of Monte Video, where the brig arrived on the 21st October, 1833; and, having there discharged a part of her outward cargo, sailed with the residue from Monte Video for Buenos Ayres, on the 21st December, and arrived there on the 24th of the same month. The brig, on the 24th May, 1834, after discharging at Buenos Ayres the said residue of her outward cargo, and having there taken in another cargo, sailed for Philadelphia. On the 2d June, 1834, the brig, pursuing her said voyage home, was wrecked in St. Sebastian's bay forty miles east of Rio Janiero. The libellants continued on board the brig, from the time of their shipment until the said 2d June, faithfully performing their duty as mariners. They further aver that by their labour and exertions, with the rest of the crew, a great part of the cargo of the brig, more than sufficient to pay the wages of the crew, and a great part of her tackle, were saved and brought to shore. They allege that, allowing them for their services on board of the brig, from the time of their going on board to the time of the wreck, there is due to Bronde a balance of ninety-six dollars and eighty-two cents, to Moore ninety-three dollars and sixty-eight cents, to Dove one hundred and nine dollars and twenty-three cents. The libel prays for a decree for these sums to the libellants respectively, or a salvage equal in amount thereto.

The answer of Thomas A. Haven denies that he was a party to any contract with the libellants, for wages for the voyage in the libel mentioned, or that he is in any respect answerable or liable for any part of the said claims for wages or salvage, as owner of the said brig Caroline. That he is wholly ignorant of these pretended claims, and therefore denies the

same. He then traverses all the facts alleged in the libel, and submits himself to the judgment of the court.

On these pleadings, the cause came on to a hearing, when the counsel for the libellants abandoned their claim for salvage, it appearing that all the articles saved from the wreck had been consumed in expenses. The case then rested on the claim for wages, as follows: From the time the men were shipped, to wit, the 30th July, 1833, to the arrival of the brig at Buenos Ayres, which was on 24th December, 1833, and half the time she lay there. She sailed from that port on the 24th May, 1834. Wages were therefore demanded from 30th July, 1833, to 20th March, 1834.

These dates and facts being agreed to, the respondent puts himself upon two grounds of defence. 1. That the brig, at the time she sailed from Philadelphia was owned by him, but that a short time after she sailed, she was transferred by him to John A. Haven, of New York, whereby the respondent was discharged from all liability for the wages of the crew, who are bound to look for them to John A. Haven, the owner of the vessel, to whom the whole freight and earnings were transferred with her; and that the law turns the seamen for their wages to the owner of the vessel when the demand is made, and not to those who at any previous time might have been her owners. 2. That if the respondent is liable, the wages ought to be calculated, not for half the time the brig lay at Buenos Ayres, but only up to the time when she discharged her cargo there and commenced taking in her homeward cargo; that it appears by the evidence that the outward cargo was finally discharged on the 4th January, 1834, and that, on the next day, they commenced taking in the return cargo.

1. On the first point, the bill of sale of the brig to John A. Haven is dated on the 14th March, 1834; nearly eight months after her departure from Philadelphia, and two months after the discharge of the outward cargo. If, therefore, the respondent is right in fixing that period for the termination of the

contract for wages, they were actually earned and the services for them rendered, while he was the owner of the vessel. Nay, the claim insisted upon by the libellants also comes within the time, when the respondent continued to be owner of the brig. The respondent, however, contends, that when he transferred the brig, he also transferred and parted with all her freight and earnings, and thereby discharged himself from his contract with the mariners, and all the obligations dependent upon it, which fall upon the new owner, to whom the mariners must look for whatever they are entitled to. He says, that as no owner is named in the shipping articles, the seamen did not give credit to him or any particular individual, but that they relied upon the master and ship for their wages, and that the law further makes the owner, whosoever he may be, when the demand is made, but not the antecedent owner, responsible for their claims.

With whatever earnestness and ingenuity this doctrine has been supported by the learned counsel for the respondent, it is certainly novel and repugnant to the first principles of fair and equal dealing. If there be any thing settled in the law it is that seamen have a triple security for the payment of their wages, the ship, the owner, and the master. This is the security the law gives them, on a sound and just policy, and are we authorised to say, that because the name of the owner may not be set out as a party to the contract, therefore the mariner has consented to give up his liability and abandon the rights conferred on him by the law? Can we presume that he did not know who was the owner, and gave no credit to him? I think not. The owner is bound, not by any direct or express covenant or promise in the written contract, but by the decree of the law, named or not named, declared or concealed. The master makes the contract, as well for his owner as himself and the ship, and all are bound by it. It is not part of the written contract that the ship is answerable for the wages, but can it be thereupon argued that the ship was not looked to for their payment. It is the security of the law which accompanies the

contract, and no presumption can be raised against it because it is not expressly declared. Indeed the shipping articles contain little more than a detail of the duties of the mariner; for his rights he is left to the protection of the law. It has been truly replied by the libellants counsel that the owner of the vessel, although not named, does appear on the face of the contract as a party to it, for the forfeitures and damages, which are visited upon a seaman, who absents himself from his duty for more than forty-eight hours, are all "to the use of the owner or owners of the said ship or vessel." The general legal liability, to which I have alluded, is a sufficient answer to this part of the respondent's argument.

The question still remains, whether the sale and transfer of the brig and her freight discharge the owner from his responsibility to the mariner, and pass him over to the new owner, or to whomsoever may happen to be the owner when the wages are demanded. We have here a clear, unquestioned contract, made by the master of the vessel, the agent of her owner, binding personally upon both; the owner being the principal party in interest, and responsible to the seaman for all his rights under and by the contract. Can a party to this contract withdraw himself from it at his pleasure, and put a substitute in his place to fulfil his engagements? Can he change, and perhaps destroy the security on which the other party relied, turn him over to a stranger without his consent, and leave him to learn it for the first time, after his services have been rendered, and his engagements performed on the faith of the contract as he made it? He proceeded on the voyage on the confidence he gave to the contract, and to the parties who were responsible to him for it. After months or years of hard and faithful service, the vessel is wrecked, so that he has no fund there for the payment of his wages: the master, who, in truth, is seldom much considered as a security, is ruined by the disaster; and when the seaman comes home to the place where his contract was made, to the owner of the vessel who was his owner and his party, he is told by him that he has sold the vessel to a beggar or a

merchant in Russia; that all his engagements and responsibilities went with the ship and her freight; and that the mariner must follow them for his wages. There is something to my notions of justice so shocking in such a reply to such a demand, that, unless I am bound by some authority I may not resist, I can never yield to it.

It is necessary to examine the authorities cited to maintain this ground of the defence.

The case of Hussey v. Allen (6 Mass. Rep. 163) was an action for supplies furnished by the plaintiff for a sloop, alleged to be the property of the defendant. The facts were, that the sloop sailed from Edgarton to the Falkland Islands on a whaling voyage, on or about the 13th June, 1805, being then owned by the defendant. In the month of September following, the defendant sold half of the sloop to certain persons, and in December sold the remaining half. In December 1807, and February 1808, the plaintiff, at the request of the master, furnished the sloop, then in South America, with necessaries to fit her for sea, to enable her to return home. Neither the plaintiff nor the master knew of the sale of the vessel, at the time the supplies were furnished. She arrived in Boston in April, 1808. In this case the court held that the first owners of the sloop were not liable for these supplies, and the reason of the decision distinguishes it at once from our case. The contract was made and the supplies furnished after the sale, and when the defendant had no interest in the vessel; she was altogether the property of another. The master who made the contract was no longer the agent of the original owners, or authorised to bind them; the supplies were not for their use or benefit; they were neither expressly or by any legal or equitable implication, parties to the contract. The difference between such a case and this is most obvious. Here, when the contract was made, the respondent was a party to it, was known as such; was bound by it, and is now endeavouring, not to disclaim engagements never made by him or by his authority, but to discharge him-

self, by his own act, unknown and not assented to by the other party, from those which were by him and his authority.

In the case of Aspinwall v. Bartlett, (8 Mass. Rep. 483,) the opinion of the court is very briefly given, and not with any satisfactory certainty or explanation; but, by adverting to its circumstances, we shall see how widely it differs from that before us. It was an action of assumpsit for wages. The plaintiff shipped as a mariner on a voyage from London to some port in Spain. The ship had previously sailed from Plymouth in Massachusetts, being then owned by the defendant and commanded by one Bartlett. She arrived at London and was virtually sold to a London house, who were to victual and man her. After this disposal of the vessel, the master, who sailed in her from Plymouth, had no charge or concern with her, and another person was appointed her master by the new owners. Neither the former master nor owners had any interest in her voyage from London. The master testified that he never shipped the plaintiff or any of the crew for that voyage; nor had he ever seen the plaintiff, until the return of the ship from South America to Plymouth. We see, then, that the vessel was sold and delivered to the new owners, and a new master appointed by them, with whom, as their agent, the contract with the plaintiff was made. He had no contract of any kind, express or implied, directly or indirectly, with the original owners, and it is difficult to conceive any principle of law or equity in support of such a claim.

The case of Lamb v. Durant (12 Mass. Rep. 54) contains a declaration, which could not be denied, that where a ship at sea is transferred, the purchaser takes her subject to all incumbrances upon her before notice of the transfer. So far as this has an application to our case, it is in affirmance of the principle that an unknown transfer does not impair rights previously existing.

The case of Brooks v. Dorr, (2 Mass. Rep. 39,) in its principle, has a bearing upon that we are considering. The ship was

captured on her voyage to Europe, detained eight months and released, proceeded on her voyage, and delivered her cargo. When the owners received notice of the capture, they abandoned to the insurers, and, of course, executed an assignment of the vessel to them. A mariner, taken on board the capturing privateer, was carried into France and imprisoned, but afterwards was discharged and returned home. It was adjudged that he was entitled to his wages until his return home, from the original owners, and not from the insurers. It was contended, with more plausibility than is found in our case, that by the capture the contract between the owners and the seamen was dissolved, or at least determined from that time; but that if the plaintiff was entitled to wages he must claim them of the underwriters, who became to all intents the owners of the ship after the abandonment, in whose employment the plaintiff was, the defendants having no interest in her. Chief Justice Parker, in giving his opinion on this case, says; "The principle now contended for would produce infinite confusion and vexation to mariners, to whom every facility should be given by the law for the recovery of their wages. Instead of looking to the owner, with whom they contracted, and whose responsibility they knew, they are to be turned over to twenty or more underwriters, whose names they never heard, and of whose interest in the ship they are wholly ignorant. Such a principle cannot be maintained in this country, and probably never has been in any other." Judge Thatcher supports the same doctrine, and on the same principle. "Owners," he says, "and their circumstances are known to mariners, but they have no means of knowing underwriters." Judge Sedgwick says, "The plaintiff ought not to be shifted off from the defendant, with whom he made his contract, to the underwriters, to whom he is a stranger;" and Chief Justice Dana concurred.

On authority, then, as well as on what seems to me to be the clear justice of the case, I am of opinion that the sale of the brig Caroline by the present defendant did not discharge him from his contract and the liabilities arising out of it, with the

libellants for their wages, even independent of the consideration that the wages were actually earned by services antecedent to the transfer of the vessel.

2. The question remains, what amount of wages are the libellants entitled to recover? This has more difficulty in it; because, if judicial decisions have settled it in their favour, neither the authority nor the reason of these decisions is, to my understanding, clear and satisfactory. Are the libellants entitled to recover their full wages to the arrival of the brig at Buenos Ayres, agreed to be the last port of delivery, the place of the discharge of the outward cargo, and in addition thereto, for half the time she lay in that port?

I will first take the English books on this question. Abbott, in his Treatise on Shipping, (p. 447,) gives the law thus: "The payment of wages is generally dependent upon the payment of freight; if the ship has earned her freight, the seamen who have served on board the ship have, in like manner, earned their wages. And, as in general, if a ship, destined on a voyage out and home, has delivered her outward bound cargo, but perishes on the homeward voyage, the freight for the outward voyage is due, so in the same case the seamen are entitled to receive their wages for the time employed in the outward voyage and the unloading the cargo, unless, by the terms of the contract, the outward and homeward voyages are consolidated into one: and if a ship sails to several places, wages are payable to the time of the delivery of the last cargo." If this is the law, it certainly embraces the case before us, and confines the rights of the libellants to the time when the outward cargo was unloaded, even if we had not the additional circumstance that they commenced taking in the home cargo the day after the brig was unloaded; that is said to be a clearer case than if she had remained idle, waiting for a return cargo, in which case there might be some show of reason for dividing the time between the two voyages. Abbott does not hint at any such decision on the question of wages: his postulate is intelligible and just, to wit, that the seaman has his wages for the outward voyage,

and the reason is that, for that voyage, the owner has earned his freight by the services of the seaman; but the principle and the reason end with that voyage, and it should seem that when we ascertain when that voyage did end; when the freight for that voyage was fully earned; then we ascertain the time to which the seaman is entitled to his wages. But when has it been pretended that the outward voyage does not end, and its freight become due, on the delivery of the cargo? How are we authorised to continue this right of the seaman beyond the reason on which it is founded, and contrary to the truth and reason of the case; for the detention of the vessel, after the discharge of the cargo, has very seldom any reference to that cargo of her outward voyage, but relates to the procurement and loading of the return cargo for the homeward voyage?

For the law as he gives it, Abbott cites an anonymous case (1 Lord Raymond, 639,) which shows he did not understand this case as it has been taken in some of our courts. It was upon a motion for a new trial, in an action for seamen's wages, when Chief Justice Holt said, "that if a ship be lost before the first port of delivery, then the seamen lose all their wages; but if after she has been at the first port of delivery, then they lose only those from the last port of delivery." This note of the case was given to the reporter by Jacob; and what was meant by the words "from the last port of delivery," is not very intelligible. We certainly get no information of what is to be done with the intermediate time between the arrival at and the sailing of the vessel from that port.

In another case, (1 Lord Raymond, 739,) it was ruled by Holt, that "if a ship be bound for the East Indies, and from thence to return to England, and on her return she is taken by enemies, the mariners shall have their wages for the voyage to the East Indies, and for half the time that she stayed there to unlade and no more." We have here an example how loosely some of these notes of what falls from the court are made. In the former case, Holt is made to say, that the seaman shall lose his wages, only from the last port of delive-

ry; which on a strict construction would imply, that he should have his wages up to the time of the sailing of the vessel, inasmuch as the wages from and not at that port, are all that he loses; a larger grant to him than has ever been accorded by our courts in their utmost liberality to mariners; but in the subsequent case, a few years after, the same Chief Justice says, that where a vessel is lost on her homeward voyage, the seaman shall have his wages for half the time the ship stayed at the outward port to unlade; thus giving a rule as much narrower than that adopted by our courts, as his former one was broader. The wages are not to be paid for half the time the vessel is detained, although a forced construction might give it that meaning, but only for half the time she is detained to unlade, that is, for half the time employed in unloading, or for that purpose. A note by the reporter shows that he understood Lord Holt to give the rule in this restricted sense. It is as follows: "It should seem reasonable that the mariners should have their wages for the whole time during which they were unlading, because their wages during that time are payable in respect of the outfit and carriage which is saved." Here we have Abbott's rule and his reason for it. The reporter thinks that Lord Holt did not go far enough in giving the wages only, for half the time spent in unlading the outward cargo; but that they should be paid for the whole time they are thus employed.

In an anonymous case, (12 Modern, 408,) very briefly reported, Lord Holt is represented as giving another rule different from both the others. "If a ship go freight of an outward voyage, the seamen shall have their whole wages out, but if on their return to England the ship be taken, or other mischief happen, whereby the voyage homeward is lost, they shall have but half the wages for the time they were in harbour abroad." But in the same book, (12 Modern, 442,) it is said, by the court: "In respect to seamens' wages, the usage is, if the ship be lost before her arrival at the port of delivery, they lose their wages out. If she arrive safe in that port, and is lost on her

homeward voyage they have their wages out, but lose their homeward wages." Here the court assert the doctrine given by Abbott, provided the wages out shall be understood to embrace the time occupied in unlading, which may be done without a forced construction.

On this review of the English cases, we find nothing to maintain the doctrine of our courts, dividing the time of detention between the outward and the homeward voyages, but the doctrine of Lord Holt, (12 Modern, 408,) which is entirely inconsistent with the opinion of the same great judge in other cases, and supported by no known principle or satisfactory reason; on the contrary, the whole legal reasoning on the subject, the policy and principle on which wages are paid, are adverse to this doctrine, making the wages payable only for the outward voyage, and terminating that voyage with the delivery of the outward cargo. And so Abbott understands the law to be with a full knowledge of all the English decisions. It should be remarked, too, that the anonymous case (12 Modern, 408,) does not give the rule taken by judge Peters, who divides the time, giving full wages for half of it; whereas in that case half the wages for the whole time the vessel was in port are given. It is true, the result is the same to the seamen, but the principle, if it have any, is different.

I shall briefly turn to the American cases, and if they are sustained by good reasons and sound principles, it will be no objection to them with me that they are deficient in foreign precedents.

In the case of The Cynthia (1 Peters Ad. Dec. 204,) Judge Peters says, "There can be no doubt of the principle that wages are due to seamen in cases of capture or wreck, to the last port of delivery, and for half the time the vessel stayed there. This is settled law in this court." No case is cited, no reason given, no principle invoked to maintain or explain this opinion. It is the first reported decision of this court on this point, unless we may regard as such an incidental dictum of the same judge in the case of Bordman v. The

Elizabeth, (1 Peters Ad. Dec. 130,) where he says, "the seamen must receive wages to the last port of delivery, and for half the time the vessel stayed there." In the case of Johnson v. The Lady Walterstoff, (1 Peters Ad. Dec. 215,) and also in that of Cranmer v. Gernon, (2 Peters Ad. Dec. 391,) the same decree is pronounced, and still without any authority cited, or reason given for it.

Judge Washington meets this question in the case of Thompson v. Faussatt, (Peters C. C. Rep. 182,) and admitting the difficulty of the case before him, says, "that whenever the vessel is lost on her return voyage, her arrival at the last port of delivery of the outward cargo, or at the last port of destination, if there be no cargo, fixes the time to which full wages are allowed;" thus far this most excellent and learned judge proceeds on known principles and unquestionable authority; but he goes on to say, "that one half the time of her stay there should be added to the outward voyage and the other half to the homeward voyage, and be considered as parts thereof." But why should this be done? The judge gives us no reason, no authority. He had before fixed the boundary of the allowance of wages when a vessel is lost on her homeward voyage; and why he afterwards passes that boundary, enlarging it indefinitely, is not explained. Indeed the boundary assumed by him is even more confined than the English rule, for it stops at the arrival of the vessel at the port of delivery, and does not take in the time occupied in discharging and delivering the cargo.

In the case of Jones v. Smith, (4 Hall's Law Journ. 276,) the court of Maryland seems to have taken another rule, different from any we have before found abroad or at home. That court did not divide the time between the arrival of the ship at the port of delivery and her sailing from thence; that is the time she stayed there, but took the time when she was unladen as the first point, and the day of her sailing for the second, dividing the time between them and giving wages accordingly; making a difference in favour of

the seamen, as they received full wages to the intermediate day between the unlading and departure of the ship, instead of between her arrival and departure. Such a variety of incongruous rules ought to drive us back to the principle on which wages are given in such cases, and then we shall be on sure ground always consistent and safe.

In the case of Galloway v. Morris, (3 Yeates, 445,) Chief Justice Shippen, speaking for the court, says, "where a vessel has been captured the wages of the seamen are lost from the last port of delivery, and so has the law been held ever since the case in 1 Lord Raymond, 739." We must remark in the first place, that the chief justice makes no suggestion of dividing the time of detention between the outward and homeward voyages, which has been held, at least in our courts, since the case cited by him from Lord Raymond, and antecedent to the delivery of his judgment. Secondly, that the case in Lord Raymond does not state the law to be that the wages are lost from the last port of delivery, but "for half the time that they stayed there to unlade." In the third place, that the expressions of the chief justice are those used by the court in the case in Lord Raymond, upon the uncertainty of which I have already remarked.

The doctrine of allowing wages for half the time the ship remained in the outward port, as far as I have been able to trace it, was first established in this court, unless we should except the doctrine in the anonymous case in Modern Reports, by Judge Peters, as early at least as 1798, and afterwards found its way into the courts of Massachusetts. In the case of Hooper v. Perley, (11 Mass. Rep. 545,) in 1814, Chief Justice Parker says, "The general rule, as to wages of seamen, which has been for many years recognised and uniformly adopted in our courts, is, that if a ship has earned one or more freights, and is afterwards lost before completing the voyage for which the seaman was hired, he is entitled to his wages up to the last port of delivery and for half the time that the ship lies in that port." It appears to me that there is a want of

connection between the premises and the last branch of the conclusion of this judgment. The earning of the freight is the given ground of the seaman's right to wages: and yet the wages are earned indefinitely beyond this point, through a period when no freight is earned. The earning of freight is determined by the delivery of the cargo, but the vessel may, and often does, stay at the port for many months after that delivery, for objects having no possible connection with the outward voyage or the freight earned by it. In the margin of the book, and opposite to this opinion of the chief justice, we find a reference to Abbott; to Peters Ad. Dec. 192, and to Comyn on contracts, (p. 372,) as the authorities, we may presume, which sustain the judgment of the court. I think we have seen that Abbott is very far from supporting any such doctrine; the case of The Cynthia certainly does; but without assigning any reason or authority for it; and Comyn literally quotes Abbott as I have done, and also recites the cases in Lord Raymond, 639. 739. In not one of these cases, as we have seen, is the doctrine of Chief Justice Parker advanced. In all these books "the time employed in the outward voyage and the unloading the cargo;" and the "time of the delivery of the last cargo," are made the most favourable termini of the seaman's right to wages; and, with the exception of the suggestion in 12 Modern Reports, no intimation is given in any English case I have seen, certainly in none of those referred to in the case of Hooper v. Perley, of extending the claim of wages over half the time the vessel stayed in the port of delivery. The supreme court of Massachusetts acting, it is presumed, on the same mistaken foundation, continued to assert this doctrine in the cases of Locke v. Swan, (13 Mass. Rep. 76,) and Swift v. Clarke, (15 Mass. Rep. 173.)

I shall close this examination of discordant and unsatisfactory adjudications, leaving us at last without a rule to guide and govern us, with one of commanding authority in any legal inquiry, and especially on a question of maritime contract. In the case of the Two Catherines, (2 Mason, 329,) Judge Story

says, "It is, in my judgment, perfectly clear, that the seamen are entitled to wages up to the time of the ship's arrival at Ivica, and during half the time the ship remained there; for at that place the homeward voyage commenced. This doctrine is not new in our courts. It was early decided in the supreme court of my native state after full argument, and about the same period adopted by a venerable judge of our country. It appears to me to be a natural result of the principles held by Lord Holt, (12 Mod. 409,442, and Lord Raymond, 639,739.)" The judge also refers to Brown v. Benn (2 Lord Raymond, 1247,) which relates only to what shall be deemed a port of delivery; also to Hernaman v. Bawden, (3 Burrow, 1844,) which were on questions of freight. In this case of The Two Catherines, I shall, with a true and deep sense of the deference which is due to the judge who decided it, take the liberty of analysing his opinion, and the reasons he gives for it. The first reason is, "for at that place the homeward voyage commenced." This is precisely the point or test to which I would bring this question. Let it depend upon the commencement of the homeward voyage; or, what must be the same thing, the termination of the outward voyage. Where is authority or the reason to say that the one ends and the other begins, when the ship has been half her time at her port of delivery? Can it be denied that, in point of law, the outward voyage is terminated by the delivery of the cargo, which may always be ascertained, and that, in point of fact, the discharge of the vessel almost universally takes place very soon after her arrival, although she may be afterwards detained a long time by waiting for a return cargo, or other circumstances having no connection with the outward voyage or its cargo? The judge says, "At that place the homeward voyage commenced." But when did it commence? This is the difficulty, and no answer or explanation is given to it. In that case the ship went in ballast to Ivica for a cargo of salt, and can we say that the homeward voyage did not commence when she began to take the salt on board? Can we attach the time and labour so employed to the outward voyage? In fact

this division of the time the ship was detained at Ivica, between the outward and homeward voyages, was not a prominent or important question in the case. One principal question was whether the ship, having discharged her cargo at Gibraltar, and gone to Ivica in ballast for her return cargo, Gibraltar was not the terminus of the first voyage. On this point the judge differs from Judge Washington's opinion in the case of Thompson v. Faussatt, who thought the outward voyage ended at the place where the cargo was unloaded, while Judge Story carries it on to the place to which the vessel went in ballast for her return cargo, considering it to be an intermediate voyage which constitutes no part of the return voyage. But should it not be affirmatively a part of the outward voyage to support the claim for wages? It is not for me to decide between these learned judges, nor does the case I have under consideration call for it; but it does seem to me that Judge Washington has the better reason; and gives us a more plain and practical rule, and more consonant with the principles of the law than that adopted by Judge Story. In the case of The Two Catherines, it does not appear that when the vessel sailed from Newport for Gibraltar, she was to proceed on, after discharging her cargo, to Ivica for a return cargo; nor that Ivica was in contemplation as a port to which she was to go at any time or for any purpose. The learned judge says, "The ship's having gone from Gibraltar to Ivica in ballast, does not vary the case any more than if the whole of the outward voyage had been performed by the ship in ballast." This is true, if the outward voyage was from Newport to Ivica and did not end at Gibraltar, or if Ivica can be considered as a port of delivery; but this is the question, the disputed point. Did the outward voyage end at Gibraltar, the place where the outward cargo was discharged, or may it be continued to Ivica, to which port the ship went to obtain a return cargo, and which, when the outward voyage was commenced, was not in contemplation of any of the parties to the contract for that voyage, either expressly or by general words of description? In such a case, was Ivica a port of delivery?

When a ship sails for a designated port in ballast, that port is the port of her destination, and whether she be loaded or goes in ballast, her outward voyage is from the port of her departure to the port of her destination, and the wages are due there, because it is a part of the described voyage, and not as a port of delivery. We have seen, by Abbott, that if the ship be lost on her home voyage, the seamen are entitled to wages "for the time employed in the outward voyage and the unloading the cargo; but if there be no cargo to be unloaded, they are nevertheless to be paid for the voyage." But is not this a very different case from one in which the ship sails for a given port, with a cargo, to unload it there, and afterwards to seek, where she may, in ballast for another cargo? There can be no doubt or question raised about what is the outward voyage in the first case, and that the wages are earned on her arrival; whereas, about the other case, two eminent judges have differed. Why is the passage to Ivica, or any other place, to be attached to the outward voyage, with which it has no apparent or ordinary connection; and when its object was to obtain cargo for the home voyage, which is thus clearly and essentially connected with it? After the discharge of the outward cargo, it depended on markets and various other circumstances, to what place she might proceed for another load; and the outward voyage is made to wait on all these contingencies to find its termination, when its obvious and natural end would seem to be, when its object and business was done by the delivery of the cargo. So how can we call it the last port of delivery, when the whole was before discharged at another place? Judge Story mainly relies, for his doctrine, on the admitted law, that if the vessel originally sails in ballast, the seamen have their wages in the same manner as if she were loaded; and argues that "it can make no difference that the vessel is in ballast on the intermediate, instead of the outward voyage." I have endeavoured to show that there is a difference, and that the claim of the seamen rests on a ground in the one case, which they have not in the other. In this question, however, between two great judges, that which is

material to us was not moved, that is, the claim of wages for half the time the vessel remained in port, which, in our case, was the port of delivery of the outward cargo, as well as of her loading and departure for home. We have to decide the naked question, whether if a ship goes from a port in the United States to a foreign port, and there, having discharged her cargo, remains several months, more or less, after such discharge, and is lost on her homeward voyage, the seamen are entitled to their wages for half the time of the detention of the ship, whatever may have been the cause of her detention or her employment while she remained there.

The most important question, in the case of The Two Catherines, as declared by Judge Story, was whether the seamen can claim wages as such for the homeward voyage, having saved from the wreck, property more than sufficient in value to cover all the wages. The question I have to decide was assumed by the judge, arguendo the points I have stated, but it was not made by the counsel on either side, it was not a question in the case. I return to the question, "when did the homeward voyage commence" in the case before us? Did it not commence when the outward voyage ended? There was no intermediate voyage or time hanging between the outward and the homeward voyages, and belonging to neither, if this can be in any case; but the second necessarily began when the first ended, and the first necessarily ended when the second began. What authority is there for saying that the outward voyage continues for three, six, or twelve months after the arrival of the vessel at her outward port and the complete delivery of her cargo there? How can we say that the outward voyage continued during the time when the brig was actually taking in her return cargo? What connection in fact, or in law, had this employment of the mariners with the outward cargo, or its freight or any thing belonging to it? Judge Story put the law on the question, "when did the homeward voyage commence?" It should rather, in our case, be, when did the outward voyage terminate? unless, as I believe, the time is the same for both.

When then, by clear and undisputed evidence, it is shown precisely when the one did end and the other did begin, can I apply to the first, employment and services which clearly belong to the latter? Can I charge against the first, wages clearly earned by labour for the second? It cannot be questioned that if the ship be lost on her homeward voyage, the wages for that voyage are lost with her, because her freight is lost, and the claim of wages is therefore clearly attached to the goods for which the freight is payable; and why not to the putting of them on board, as well as to the carrying of them in safety; or, at least, I may say on what principle, by what reason can these services or the wages earned by and payable for them be made a charge against the outward cargo and voyage? After thus declaring the law, the learned judge refers, in proof of it, to the decisions in the state courts of Massachusetts, which I have already examined, and shown, as I think, not to be supported by the authorities cited for them: nor is any legal principle or reason attempted to be given for their justification. The judge then proceeds; "It appears to me to be a natural result of the principles held by Lord Holt (12 Modern, 409, 542, and 2 Lord Raymond, 639, 739.") With the legal and logical mind of Judge Story, thoroughly accustomed to such researches, it would have been most satisfactory, if he had explained the process of reasoning by which he came to the conclusion he has adopted, from the cases he has referred to. So far as he asserts the right of the seamen to wages for the outward voyage, it is clear enough, but in the extension of this right over half the time the vessel may remain in port, however long or whatever may be the cause of her detention, I confess I cannot discover how or where this doctrine is to be found in the cases cited. The principle that the wages end with the outward voyage, and that that voyage ends with the delivery of the outward cargo, is much more manifest and reasonable to my mind. Why shall we adopt as a rule an arbitrary division of the time the ship remains in the port, unjust and untrue in a vast majority of cases, when the law gives us a principle reasonable, consistent, and just, for eve-

ry case? There is no occasion for the arbitrary assumption of a general rule, when it happens so rarely, if it can ever happen, that the true rule of right may not be found in every case.

I have taken this review of the cases on the subject of our inquiry, with a real desire to conform myself, if I could do so, to the course of decisions heretofore adopted in this court; but I am obliged to say, and my reasons have been shown for it, that I can find nothing in the adjudications here or in England that I can safely rely upon for the doctrine contended for by the counsel for the libellants; nothing so certain, consistent and clear that it should not be disturbed; nothing so uniform and authoritative in the decisions, that I am judicially bound to submit to them, against the convictions of my own judgment. In allowing the libellants their full wages, from the time they respectively shipped to the delivery of the outward cargo, I shall act on a principle which can neither be denied nor misunderstood. Were I to go beyond this, I should be incapable of giving a reason for it, either of my own suggestion or furnished by any of the judges whose opinions have been referred to.

I would add another observation upon the case of Thompson v. Faussatt, although it is not in place here. It was decided in 1815, and Judge Washington then considered the law, as to the wages seamen had a right to claim, in such a case as that, to be "quite unsettled." He says he had met with no case which precisely resembles it, in any book of reports; nor with any principle in the ordinances or usages of other nations, which applies to it. Now the case was of a vessel that sailed on a voyage from Philadelphia to a port in France. She arrived at St. Jean de Luz, and after discharging her cargo, then proceeded to Bayonne. A return cargo was provided for her at Bordeaux; but the master received orders to remain with the vessel in France until September. On the 25th September she sailed from Bayonne, and arrived the next day at the port of La Teste, where her return cargo was received and taken on board. She sailed from that port on her homeward voyage and was captured. The question in the case, having an application to ours,

was, whether the wages should be given from La Teste, the last port of lading and departure, or from St. Jean de Luz the port of discharge of the outward cargo. The District Court decided for the latter place, and the decree was affirmed by the Circuit Court.

Decree. That the libellants do severally have and recover their full wages, as stated in the shipping articles, from the time they shipped, to wit, the 30th July, 1833, to the 4th January, 1834, both inclusive; deducting from each of the said libellants the money paid to them respectively, and such other credits as the respondent is legally entitled to.

# DISTRICT COURT OF THE UNITED STATES.

## Eastern District of Pennsylvania.

FEBRUARY SESSIONS, 1836.

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THE UNITED STATES OF AMERICA

*v.*

SAMUEL THOMPSON.

1. Where two persons are bound jointly, or jointly and severally in an obligation, the release of one of them will discharge the other.
2. Where a separate judgment has been rendered against one obligor on a joint and several obligation, and a scire facias is issued to revive the judgment, the defendant cannot avail himself of a release given to his co-obligor subsequent to the original judgment.
3. Where a scire facias is issued to revive a judgment, the defendant cannot avail himself of matters of defence which occurred previous to the original judgment.
4. Where a joint judgment has been rendered against two defendants, a release of one of them subsequent to the judgment will discharge the other.
5. Where a release is given to a debtor of the United States by the secretary of the treasury, under the provisions of the act of 2d March, 1831, it has the same effect and is subject to the same legal consequences as an ordinary release from a creditor to a debtor.
6. Where a joint judgment is rendered against two obligors in favour of the United States, and one of them is subsequently released under the provisions of the act of 2d March, 1831, such release is a sufficient defence under a plea of payment to a scire facias, issued to revive the judgment against the other obligor.
7. Where judgment has been rendered against a defendant who has subsequently conveyed real estate to the plaintiff, he is entitled, under a plea of payment, to a scire facias, issued to revive the original judgment, to a credit for the value of the property at the date of the conveyance.

IN the years 1825 and 1826, eight custom-house bonds for the payment of sundry duties were given by Samuel Thompson

and Jonah Thompson to the United States of America. The obligors having become insolvent before the respective periods at which the bonds were payable, suits were brought from time to time as each became due. Five of these suits, instituted at August and November Sessions, 1827, were brought jointly against Samuel Thompson and Jonah Thompson, and judgments were rendered thereon, generally, on motion of the attorney of the United States, at the respective return days. On the remaining three bonds, separate suits were instituted against each of the obligors, at February, May, and August Sessions, 1828, and judgment was rendered on each, severally, for the amount of the bond in question.

On the 13th December, 1832, Jonah Thompson was released by the secretary of the treasury, under the provisions of the act of congress of the 2d March, 1831, for the relief of insolvent debtors of the United States.

At November Sessions, 1835, eight writs of scire facias were issued, on the part of the United States, against Samuel Thompson, the present defendant, for the purpose of reviving each of the judgments previously recovered against him, as well jointly with Jonah Thompson, as separately. These writs were all returned "made known" by the Marshal, and on the 9th December, the defendant filed in each case a plea of payment, with leave to give the special matter in evidence. The United States replied non solvit, and issues.

With the plea the defendant filed the following notice:

"Notice is hereby given to the District Attorney, that under the plea of payment filed in the several cases above mentioned, of Samuel Thompson, the following special matters will be offered in evidence on the trial of those cases, in support of those pleas, to wit:

1. That the sum of five hundred and forty-eight dollars and ninety-five cents was paid, by the defendant's estate, to the United States, on the 7th July, 1829.

2. That Jonah Thompson, the partner and surety of Samuel Thompson in the bonds in question, was released by the secre-

tary of the treasury on the 13th day of December, in the year 1832, from all liability for the same, and entirely discharged therefrom.

3. That on the 5th January, in the year 1833, by conveyance duly executed by the said Jonah Thompson to Virgil Maxcy, solicitor of the treasury of the United States of America, in trust for the said United States, the said Jonah Thompson conveyed to the said Virgil Maxcy, and he accepted for the said United States, certain real estates situate in the state of New Jersey, of the value of nine thousand two hundred and seventy-one dollars and twenty cents, in part payment of the debt due by the said Samuel and Jonah Thompson to the said United States.

4. That the sum of two thousand dollars was tendered by the said Samuel Thompson to the secretary of the treasury, in payment of whatever balance might be due from the said Samuel to the said United States, and which he is now ready to pay, or any part thereof, should the same be found due to the said United States, after debiting them with the sum paid in money and the value of the land conveyed as aforesaid.

By all which premises it is considered by the said Samuel Thompson, that the United States are fully paid whatever he owed them."

On the 15th March, 1836, the several cases came on to be tried before Judge Hopkinson and a special jury. They were argued by Gilpin, District Attorney, for the United States, and Brashears and C. J. Ingersoll for the defendant.

On the trial it was agreed, as the same questions of fact and the same pleas existed in each case, that the jury should be considered "to have been duly sworn and empanelled to try all and each of said suits of scire facias, and should render verdicts in all and each of them, according to the law and evidence of the said suits, under the direction of the court, as in other cases."

I. As to the first point embraced in the notice of special matter, it was admitted by the District Attorney that the sum

of five hundred and forty-eight dollars and ninety-five cents had been paid as stated, and that the defendant was entitled to a credit for that sum.

II. Under the second point, the counsel of the defendant gave in evidence, 1, The records of the court, showing that five of the judgments, to renew which these writs of scire facias issued, were rendered jointly against Samuel Thompson and Jonah Thompson. 2, The record of the proceedings of the commissioners of insolvency, appointed under the provisions of the act of 2d March, 1831, in the matter of the application of Jonah Thompson for the benefit of the provisions for the relief of insolvent debtors of the United States. 3, The warrant of the secretary of the treasury, dated 13th December, 1832, under the seal of the department, issued under the provisions of that act, for the release of Jonah Thompson, which declared that the said secretary "did release the said Jonah Thompson from his debt to the United States," on condition that he should transfer to the United States certain land belonging to him in the state of New Jersey. 4, The deed of conveyance by Jonah Thompson to the United States, of the land in New Jersey, as required by the condition of the release, and dated 5th January, 1833.

III. Under the third point, the counsel of the defendant gave parol evidence of the cost of the land in New Jersey at the time it was purchased by Jonah Thompson, which was the sum stated in the notice. To rebut this, evidence was produced on the part of the United States to show that, subsequent to the purchase, but many years before the release of Jonah Thompson, the land had greatly fallen in value, owing to an irruption of the tide and the entire destruction of the embankments by which it was protected, and that, at the time of the transfer to the United States, it was worth very little indeed.

IV. Under the fourth point no evidence of a tender or acceptance of the sum stated was proved, but merely a conversation between the secretary of the treasury and Jonah Thompson, re-

lating generally to a proposition on the part of the latter to pay that sum.

Brashears and C. J. Ingersoll for the defendant.

Though these debts originally arose on joint and several bonds of Samuel and Jonah Thompson, their character is now entirely changed. All the bonds are merged in the judgments; they are of a higher nature than the bonds; the latter are now as if they never existed. What are the judgments? Joint judgments against these two persons. It is a principle of universal law that where two parties are jointly bound, the release of one without the assent of the other, is a release of him also. The distinction of principal and surety does not exist in the case of a joint judgment. As to the release. It is a legal instrument made by an officer authorised by law to make it; by its terms it releases the debt of Jonah Thompson; it therefore releases these judgments as they stand of record. It estops the United States from proceeding under them. As they have no claim against Samuel Thompson except under them, they are estopped from proceeding against him. Another point remains under the plea of payment; that is, the absolute satisfaction of the whole debt by conveying property equal to it in value. This property cost as much as the entire debt; no price is fixed in the deed of conveyance, but proof of the cost was given before the commissioners of insolvency; the fair inference is, that it was taken by the United States at that price. Sugden's Vend. 235. Gow's Part. 225. 5 Bacon's Abr. 702. Minor v. The Mechanics' Bank, 1 Peters, 46. Willings v. Consequa, 1 Peters C. C. Rep. 301. Griffith v. Chew, 8 Serg. & Raw. 17. Millekin v. Brown, 1 Rawle, 391. Beidman v. Vanderslice, 2 Rawle, 334. Cox v. Nash, 9 Bingham, 341.

Gilpin, for the United States.

These are debts of Samuel Thompson; his notice admits that Jonah Thompson is merely a surety. He also could have had a release by complying with the law; but he now seeks it without such compliance. He has made no payment in fact, but he asks a credit as if he had. Two questions, therefore,

arise, 1. Is Samuel Thompson released from these judgments. 2. Has he paid them in whole or in part.

1. The argument of his counsel, which asserts that the bonds are merged in the judgments, must admit that this release of Jonah Thompson cannot apply to the three cases of the separate judgments against Samuel alone. But as to the others; the joint judgments rendered on the joint and several bonds; it does not affect them. It would not be a release by operation of law on the bonds, for the relation of principal and surety is acknowledged, and the release of the surety, Jonah Thompson, is no release of the principal, Samuel Thompson. It is not a release, by operation of law, on the judgments, for they are still unsatisfied and of record, and if the satisfaction were entered by virtue of the release, it would be a mere satisfaction as to Jonah Thompson. But suppose this act of the secretary of the treasury would have amounted to a release of Samuel Thompson, if it were a release at common law voluntarily made; yet it will not be attended with the same effect, when merely made under the limited power of a statute, and by a party who has no control over the debt, except so far as that statute gives him one. This is not a general release; it is a release of a person who performs certain preliminary acts which the law requires; Samuel Thompson has performed none of these; consequently he cannot claim the privilege of one who has. The rules applicable to releases at common law have never been extended to those authorised by statute. But suppose this act of the secretary of the treasury operates to release Samuel Thompson; it is ipso facto illegal; it is beyond his authority; he had no right to do any such act; his power was limited to releasing persons who performed the necessary preliminary conditions; if he has done more, the United States are not to suffer by the illegal act of their officer. 5 Bacon's Abr. 683. Rirby v. Ward, 6 Johnson's C. Rep. 242. Creagle v. Brengel, 5 Har. & John. 234. Hollingsworth v. Floyd, 2 Har. & Gill. 87. Powell v. Smith, 8 Johnson, 339. Sharp v. Speckenagle, 3 Serg. & Raw. 464. Brown v. Carr, 7 Bingham,

508. Langdale v. Parry, 2 Dow. & Ry. 337. United States v. Kirkpatrick, 9 Wheaton, 720. Locke v. Postmaster-General, 3 Mason, 446.

2. There has been no payment by Samuel Thompson except the sum admitted. The transfer of the land by Jonah Thompson is merely a personal condition for his own discharge. Besides, it is a conveyance of real estate; that is no payment until the land is sold; assignees would not be chargeable with real estate before it was sold; the United States cannot be charged with a certain sum until that sum is ascertained by a sale. But if an allowance is to be made, any value except that at the time of transfer would be manifestly unjust.

Judge Hopkinson delivered the following charge to the jury:

This is a very singular case in some of its aspects, and it is difficult to find any principle which will carry us through every part of it. I hope, however, that we shall be able to come at its substantial justice consistently with the rules of law. We shall make the attempt truly and faithfully, and if we shall fall into any errors, they may be corrected on a future and more deliberate revision by this or another court.

There are eight suits and issues on trial before you. You will take them all into your consideration, and give verdicts upon them separately, as the evidence and law applied to each case shall warrant. The cause arises from certain writs of scire facias, issued by the United States, to revive certain judgments obtained by them in this court against the defendant. The original suits in which these judgments were obtained, were brought on certain bonds given to the United States by the defendants, Samuel Thompson and Jonah Thompson, for duties on imported goods. They were joint and several bonds.

Against the demand of the United States, now on trial, the defendant can avail himself only of such matters of defence as have occurred since the judgments were rendered against him. As to any defence in his knowledge antecedent to the judgments, it was his duty to have pleaded it before the judgment was en-

tered. The defence now set up is within this limitation. It is two fold. 1. He claims an entire discharge from the whole demand or debt. 2. He claims certain credits or payments.

On the 13th December, 1832, the secretary of the treasury, by virtue of an act of congress passed on the 2d March, 1831, executed a release to Jonah Thompson, on certain terms and conditions. This release is of the debt due by Jonah Thompson to the United States. On the 5th January, 1833, Jonah Thompson conveyed to the United States certain lands in the state of New Jersey, which conveyance was one of the conditions precedent to the operation of the release. On the 24th January, 1833, there was a certificate that the conveyance was made. All these proceedings were subsequent to the date of the judgments, now under consideration on the plea of payment by the defendant, and of course, he has a right to the benefit of them to maintain his plea, so far as they will avail him for that purpose. It is on these acts and proceedings that he founds the two points of his defence, to wit: 1. That the release of Jonah Thompson operates as a release to him, Samuel Thompson. 2. That he, the present defendant, has a right to a credit against these judgments, for the property conveyed by Jonah Thompson, to the United States. The amount of this credit, and at what price or value the land should be charged to the United States, are a secondary inquiry.

I. On the first point, that is, the effect of the release, I am of opinion, that when two persons are bound jointly, or jointly and severally, in an obligation, the release of one of them, will discharge the other. Such is the principle of the law. But how does it apply to this case? If the bonds, which were the original evidence of debt, the ground and cause of action in the first suits, and which were joint and several obligations, were now on trial against one or both of the obligors, and a release could be shown of either of them, it would acquit the other. The cause of action would be the bonds; they would be an essential, indispensable part of the evidence of the plaintiff's case; they would be produced here and we should judicially know that they were joint

and several obligations, and that the recovery of the money due by them, was the object of the suit; of course any matter of defence which took away the right of recovery, would have its full effect. But such is not the case we have to try and decide. This suit is not on a bond of any description. We do not know what the bond was, or that any bond constituted the evidence of debt between these parties. We are referred to our own records for the cause of action in this suit; we find that it is a judgment duly rendered and recorded in favour of the present plaintiff, against the present defendant. In this judgment the original cause of action and the defences which the defendant may have against it, are merged and lost. The counsel for the defendant has told you that we cannot look behind it. The judgment has become the debt, and the release of a debt, which was subsequent to the judgment, has no relation back to the antecedent contract or cause of action. It existed no longer. Then the question presents itself, how is the release of a judgment, or a debt of any kind due from Jonah Thompson individually, to be applied to a debt or judgment due from Samuel Thompson?

I am of opinion, that on the trial of a scire facias to revive a joint judgment against two or more defendants, a release given to one of them, subsequent to the judgment, will be a sufficient defence and discharge of the others; but that if the judgment on which the scire facias issued, be not against all the parties to the original joint and several obligation, but against one of them only, then he cannot, on the trial of the scire facias, avail himself of a release given to his co-obligors in the original contract, subsequent to the judgment. We can look only to the judgment as the plaintiff's cause of action; we find that judgment standing against the defendant alone, and we cannot know that it was rendered on a joint and several bond, or on any other obligation than that of the defendant himself. If I were to allow myself to look beyond the judgment to the proceedings which led to it, I should find, even there, nothing to inform me that the suit was brought and the judgment given on a bond

executed by this defendant and another, as co-obligors. The declaration sets out no such matter; it recites simply a bond executed by Samuel Thompson to the United States, for a certain sum; and the judgment has affirmed that Samuel Thompson, and no other person, is indebted to the United States by virtue of that bond.

The District Attorney has argued, that whatever may be the effect of the release of one of two joint obligors, in a contract in an ordinary case between man and man, yet that this rule or principle cannot be applied to this case; that this is a special proceeding under the provisions of an act of congress; that this release has been executed by the secretary of the treasury, by the authority and under the directions of that act; that its extent and operation must be governed by the act; that it is clear that the act contemplated and intended only the discharge of the petitioning debtor, who offers to perform and does perform the conditions imposed upon him by the law, as the price of his liberation; that all these are personal in their nature and effect, and were never meant to be extended beyond the petitioning debtor, and to give another debtor the whole benefit of the law, who does not comply with any one of the conditions required by it, nor even ask for it. I do not deny, that there is force in this argument; certainly it is very plausible. It does not, however, at present appear to me to be sufficiently clear and conclusive to overthrow a settled principle of the law, or to show that this is an exception from it. It may be worthy of a future consideration. I will briefly state the reasons of the opinion I now entertain of it.

The act of congress enacts, that an insolvent debtor of the United States may make application to the secretary of the treasury "for the purpose of obtaining a release or discharge from the said debt." The secretary, after receiving the report of the commissioners of the circumstances of the case, and being satisfied that the petitioner has complied with the conditions of the act, is authorised to compromise with the debtor upon such terms as he shall think reasonable, and there-

upon he "may execute a release to him for the amount of the said debt." The same term, release, is repeated several times in the law, without any limitation or explanation of its meaning. By this authority the secretary, on the petition of Jonah Thompson, did execute a release to him, in which he says; "I do decide to release him, the said Jonah Thompson, from the said debt." We have then an act of congress, and a treasury act which, we must presume, was drawn with great care, either by the law officer of the government, or under his supervision. In this act a term is used which, in the courts of law, has a fixed and definite meaning. It is strictly technical, with a settled and determinate construction. Can I then say that congress, in using the term release, did not intend to give it the same meaning and effect, with all its legal consequences, which have always been given to it? Could it have been expected that the courts of law, finding this term in an act of congress, without any restriction or qualification, would not understand it to have the same meaning, the same force and effect, there as in any other written instrument in which it might be employed? When the secretary says he releases the debtor, why is not his release to have the same operation as any other release, by any other person? If any thing else was intended, it would have been declared and specified, as is done in the insolvent laws of Pennsylvania, which, from that of 1729 down to the latest, have contained an express provision "that the discharge of the debtor by virtue of the act, shall not acquit any other person from any debt," but that "all other persons shall be answerable for the same, in the same manner as before the passing of the act." With these views of the question, I must consider the release of the secretary of the treasury to have the same effect and legal consequences with a similar instrument made and executed by any other person.

As regards the law of this case, for which you will look to the court for instruction, while I cannot say that it is clear of difficulty, you will, in your deliberations, take it to be, 1, That a release given to a debtor of the United States, by the secretary

of the treasury under the provisions of the act of March, 1831, is of the same effect and subject to the same legal consequences, as an ordinary release from a creditor to a debtor. 2, That when a suit or trial is founded on a judgment rendered against the defendant, we may not inquire whether that judgment was given on an obligation or contract made by the defendant with another person; and that, if we might make the inquiry, we could not go out of the record of the action in which the judgment was given, and seek for the information in the evidence, to wit, the obligation or contract on which it was obtained. This, in fact, would be to try the original cause again, and to revise the judgment given in it.

The application of the law to the cases before you brings you to this result; that as to the five cases in which the original judgments were rendered against Samuel Thompson and Jonah Thompson, the release of Jonah discharges also Samuel; and in those cases your verdict ought to be for the defendant. That as to the other three cases, in which the judgments were rendered against Samuel alone, and in which Jonah does not appear by the record to have been a party, your verdict should be for the United States, for so much as shall be due upon a consideration of the other matters of defence in proof before you.

II. The credits claimed consist of alleged payments. 1. In money, the sum of five hundred and forty-eight dollars and ninety-five cents, which is admitted and allowed. 2. The lands in New Jersey conveyed by Jonah Thompson to the United States. A credit for this property is not denied, but the question is about the amount. This is for you to decide, taking the rule of law for your guide. The defendant asserts that he is to be allowed a credit to the amount which Jonah Thompson paid for the land. On the other side it is contended, that the value of the property at the time it was transferred by Jonah, as a payment, pro tanto, of his debt to the United States, is the full amount of the credit that should be allowed for it. I have no difficulty in adopting the latter rule; even if the lands at the time of their transfer to the

United States had been in the same situation as when they were purchased by Jonah Thompson. Until the transfer, the United States had no interest in them, and then their interest was to the amount of the value of the property and no more. The fluctuation in the prices of real estate is immense and every purchaser takes it at its value at the time of his purchase. This transfer of land is pleaded as a payment. Was it a payment for what it cost six years before, or for what it is actually worth to the creditor who takes it as a payment? How much of his debt will it pay?

But the case is infinitely stronger here. By an accident, by the violence of the elements, after the purchase by Jonah Thompson, and long before his conveyance to the United States, the value of the land is changed, is almost wholly destroyed and lost. Is it then to be charged to a creditor, who takes it for a debt, at the value it held antecedent to this destruction? A piece of land of little value may have upon it mills or factories erected at a monstrous expense, and its price would be accordingly. They are destroyed by flood or fire, and afterwards the land is assigned to a creditor, can it be imagined that he should be charged with it at its value before this loss. So the embankment of this meadow constituted its value; the banks are swept away and the value proportionably reduced. It seems to be needless to illustrate a proposition so clear; and I should have left it to you without a word, if it had not been so earnestly pressed upon by the counsel of the defendant.

It has been further insisted, that if you should not take the value at the time of Jonah Thompson's purchase, you should at least go back as far as his insolvency, when the United States acquired a right in the property. In the first place, this insolvency was subsequent to the destruction of the banks of this meadow. But if it were not so, the insolvency of Jonah Thompson did not pass the property of this land to the United States; it gave no title to it; they could not sell it or take possession of it, or exercise any act of ownership over it.

His insolvency gave them a preference over his other creditors, to be paid from the proceeds of his property, but no specific right or title to the property. The defendant should be allowed a credit for the value of these lands, at the time of their conveyance to the United States, of which you will judge from the evidence you have heard. The five judgments affected by the release will be put out of the case; and against the three remaining judgments you will allow a credit for the five hundred and forty-eight dollars and ninety-five cents, and the value of the lands at the time of their transfer to the United States.

The JURY found verdicts for the United States in the cases arising under the three original judgments rendered against Samuel Thompson alone, and in favour of the defendant in the five remaining cases.

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